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Preferred Private Parts: Importing Intersex Autonomy for *M.C. v. Aaronson*

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NOTE

PREFERRED PRIVATE PARTS: IMPORTING
INTERSEX AUTONOMY FOR *M.C. v. AARONSON*

*Ryan L. White**

INTRODUCTION..... 778

I. IS IT A BOY OR A GIRL?: AN OVERVIEW OF
INTERSEXUALITY..... 781

 A. Defining Intersex..... 782

 B. History of Medical Responses to Intersex 783

 C. The “John/Joan” Case Study..... 784

 D. Current Practice of Genital-Normalizing Surgery..... 788

 E. Intersex Voices..... 790

II. INTERNATIONAL JURISPRUDENCE & THE UNITED
STATES’ COMMENCING CASE ON INTERSEX
ISSUES..... 793

 A. The Constitutional Court of Colombia..... 793

 1. *The Decision of Y.Y.*..... 794

 2. *The Decision of X.X.* 797

 3. *The Decision of N.N.*..... 800

 B. The Cologne Regional Court of Germany..... 802

 C. The Self-Determination Doctrine in the United
 States..... 804

 D. The *Crawford* Case..... 805

 E. Alternative Policies & Pragmatic Approaches..... 808

III. DEVELOPING THE *CRAWFORD* RULE: IMPORTING
AUTONOMY FROM COLOMBIA AND GERMANY..... 810

 A. Constitutional Implications 810

 B. Evaluating M.C.’s Best Interests..... 813

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1. The Right to Self-determination	814
2. Developing an Identity	815
3. The Timing of Surgery	816
C. The <i>Crawford</i> Outcome	816
CONCLUSION	820

INTRODUCTION

If a physician told you that it was impossible to determine the sex of your child because the child's genitalia had characteristics of a penis and a vagina, what would you do? Would you authorize the doctor to surgically construct a vagina or a phallus so that your child's ambiguous genitalia could be "normal"?

Many parents have no idea how to react or even accept the realization that their child is intersex—a naturally occurring biological phenomenon where a child is born with sex characteristics that do not conform to the traditional male or female definitions.¹ Although intersex individuals occupy a marginalized status, they have recently received more public attention and have benefited from inclusion in the lesbian, gay, bisexual, and transgender ("LGBT") movement.² Even though

1. See *Intersex Definition*, COLLINS ENGLISH DICTIONARY, <http://www.collinsdictionary.com/dictionary/english/intersex> (last visited Mar. 24, 2014) (defining intersex as "the condition of having characteristics intermediate between those of a male and a female"); see also *What Is Intersex?*, INTERSEX SOC'Y OF N. AM., http://www.isna.org/faq/what_is_intersex (last visited Mar. 14, 2014) (defining intersex as a person "born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male"). The term "Disorder of Sexual Development" ("DSD") also describes the conditions of genital ambiguity and has been used increasingly in medical and academic literature for scientific and ethical reasons. This Note, however, exclusively uses the term "intersex" to describe this phenomenon.

2. See *Lesbian, Gay, Bisexual, Transgender, and Intersex Initiative*, GLOBAL RIGHTS, http://www.globalrights.org/site/PageServer?pagename=wwd_initiatives_lgbti (last visited Mar. 14, 2014) (describing the lesbian, gay, bisexual, transgender, and intersex ("LGBTI") initiative launched in 2006 by human rights activists). While this Note uses the acronym "LGBT," other acronyms can also be used to describe sexuality and gender identity-based communities such as lesbian, gay, bisexual, transgender, and queer ("LGBTQ"). See Vicki L. Henry, *Have No LGBTQ Clients? Think Again: What Every Attorney Representing Youth Needs to Know*, BOS. B.J., Summer 2013, at 10 (using the acronym LGBTQ to describe a community of individuals who identify with genders and sexualities outside of societal norms). For a discussion on the progress of the intersex patient advocacy movement, see SHARON E. PREVES, INTERSEX AND IDENTITY: THE

members of the intersex community can face different forms of discrimination than the LGBT community, they endure hardships similar to those experienced by LGBT persons, which allows for common advocacy goals.³ Intersex and transgender individuals can face common issues concerning their gender and sex, but the terms “intersex” and “transgender” are not interchangeable.⁴ While the term “intersex” refers to a biological phenomenon, “transgender” encompasses a spectrum of individuals’ self-identifications and gender expressions that do not match one’s assigned sex.⁵ The word “intersex” is also used in place of the antiquated term, “hermaphrodite,” which was commonly used to describe persons having reproductive organs of both the male and female sex up until the end of the twentieth century.⁶

CONTESTED SELF, 151 (2005) (describing the efforts of the Intersex Society of North America to influence the medical community in the early 2000s and the inclusion of prominent intersex speakers at notable medical conventions); *see also* Morgan Holmes, *Deciding Fate or Protecting a Developing Autonomy? Intersex Children and the Colombian Constitutional Court*, in *TRANSGENDER RIGHTS* 102, 103–05 (Paisley Currah et al. eds., 2006) (chronicling the status of intersex advocacy from its humble beginnings in the 1990s to its rise in the public conscience in today’s social, academic, and medical environments).

3. *See generally* JAMIE M. GRANT ET AL., NAT’L CNT. FOR TRANSGENDER EQUAL. & NAT’L GAY AND LESBIAN TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* (2011) (examining issues facing transgender individuals in the United States including those who identify as intersex); *see also* SILVAN AGIUS & CHRISTA TOBLER, EUROPEAN COMM’N, *TRANS AND INTERSEX PEOPLE: DISCRIMINATION ON THE GROUNDS OF SEX, GENDER IDENTITY AND GENDER EXPRESSION* (2012) (discussing EU law and its similar effect on transgender and intersex individuals).

4. *See GLAAD Media Reference Guide Transgender Glossary of Terms*, GAY AND LESBIAN ALLIANCE AGAINST DEFAMATION, <http://www.glaad.org/reference/transgender> (last visited Nov. 11, 2013) (designating the term transgender as an “umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth” while intersex describes “a person whose biological sex is ambiguous”).

5. *See id.*; *see also* *What’s the Difference Between Being Transgender or Transsexual and Having an Intersex Condition?*, INTERSEX SOC’Y OF N. AM., <http://www.isna.org/faq/transgender> (last visited Feb. 20, 2014) (explaining that transgender individuals are born with typical female or male genitalia and experience an *internal* conflict between their gender identity and their biological sex while intersex individuals have *physical* sex characteristics that are ambiguous).

6. JAMISON GREEN, *INVESTIGATION INTO DISCRIMINATION AGAINST TRANSGENDERED PEOPLE* 63–64 (1994) (noting that “intersex” is a more appropriate term for persons with ambiguous or underdeveloped sex organs than the politically incorrect term “hermaphrodite”).

Historically, society has functioned upon the premise that there are two unambiguous sexes—male and female.⁷ Further, when children are born with ambiguous genitalia, the medical community has responded by surgically altering the intersex infant to fit into either the male or female sex category.⁸ So-called genital-normalizing surgery, however, does not aim to disambiguate a child's sex for reasons of medical necessity, but rather to allay parental concerns and preserve social norms by “fixing” genitalia that society has deemed “unacceptable.”⁹

In the District of South Carolina, the complaint in *M.C. v. Aaronson* (“the *Crawford* case” or “*Crawford*”) recently introduced to the United States the legal, ethical, and medical issues regarding genital-normalizing surgery.¹⁰ Non-US tribunals, on the other hand, have already deemed this practice to be unconstitutional and violative of fundamental rights.¹¹ In fact, several countries have adopted methods outside the court system that promote intersex autonomy and exhibit changing social attitudes toward gender norms.¹² These methods include a third gender category on government-issued documents such as birth certificates and passports, which directly challenges the custom of the male-female sex dichotomy that is the driving

7. See Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in *TRANSGENDER RIGHTS*, *supra* note 22, at 51 (concluding that the law never recognized the need to define male or female until intersex issues became relevant during the turn of the twenty-first century); MORGAN HOLMES, *INTERSEX: A PERILOUS DIFFERENCE* 57–58 (2008) (discussing intersex issues within the sole context of male and female due to the social convention of acknowledging only two unequivocal sexes).

8. See Greenberg, *supra* note 7, at 53 (explaining the practice of “fixing” infants' ambiguous genitalia to conform to medically established norms); see also Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 *BERKELEY J. GENDER L. & JUST.* 59, 60 (2006) (mentioning genital-normalizing procedures which aim to allow intersex individuals to live “normal” lives).

9. See *infra* Part I.D (noting that the medical community sees ambiguous genitalia as a social emergency requiring immediate treatment rather than a diagnosis which needs medical attention).

10. Complaint para. 46, *M.C. v. Aaronson et al.*, (D.S.C. filed May 14, 2013) (No. 2:13-cv-01303), 2013 WL 1961775 [hereinafter *Crawford Complaint*]. As of March 2014, this case is currently being litigated at the pre-trial level in federal court.

11. See *infra* Part II.A–B (introducing the non-US decisions that concluded genital-normalizing surgery can deprive individuals of fundamental freedoms).

12. See *infra* Part II.D (exploring the unique administrative approaches several nations have implemented to break away from traditional gender norms).

force behind genital-normalizing surgery.¹³ These evolving attitudes on sex and gender present legal theories that are directly applicable to the *Crawford* case.¹⁴

This Note focuses on the practice of genital-normalizing surgery on intersex infants and its consequent deprivation of intersex individuals' fundamental rights.¹⁵ Part I of this Note discusses the definitions and categories of intersex conditions and provides an overview of the history of sex assignment surgery. Part II discusses four non-US cases regarding forced sex assignment and examines the facts and claims of *Crawford*, the first lawsuit in the United States that seeks to redress the detrimental effects of genital-normalizing surgery and its deprivation of fundamental rights. Finally, Part III applies this non-US jurisprudence to *Crawford* to argue that genital-normalizing surgery violates an individual's constitutional right to liberty.

I. IS IT A BOY OR A GIRL?: AN OVERVIEW OF INTERSEXUALITY

Intersexuality is an extraordinary aspect of nature that presents medical, ethical, social, and legal considerations. This Part describes the biological characteristics and medical community's reaction to intersexuality and introduces the first plaintiff in the United States to sue on issues relating to their intersex status. Part I.A provides a scientific background on intersexuality and its varying conditions. Part I.B then discusses the medical profession's routine response to intersex infants and how physicians alter children's ambiguous genitalia. Part I.C introduces Dr. John W. Money's "John/Joan" case study and how it significantly influenced the medical profession in adopting genital-normalizing surgery to treat intersex infants.

13. See *infra* Part II.D (commenting on countries that have adopted a third gender option for government identity documents).

14. See *infra* Part III (arguing that the non-US cases and unique approaches previously examined provide legal principles on genital-normalizing surgery that can influence the *Crawford* case).

15. This Note uses the term "genital-normalizing surgery" and "sex assignment surgery" to refer to any procedure performed by a surgeon on an intersex individual or person with ambiguous genitalia for the purpose of making their genitals adhere to the traditional appearance of male or female anatomy.

Part I.D examines the policies of the American Academy of Pediatrics on disambiguating intersex infants' genitalia. Finally, Part I.E tells the story of Max Beck, who suffered tragedies in adolescence and adulthood because of genital-normalizing surgery.

A. *Defining Intersex*

Intersex individuals have variations in sex characteristics, such as ambiguous external genitalia, ambiguous internal reproductive organs, or uncommon chromosomal patterns.¹⁶ Examples of ambiguous external genitalia include “micropenis” (an unusually small penis), “cliteromegaly” (a significantly large clitoris), and “scrotalized labia” (a condition where external genitalia resemble labia and a scrotum).¹⁷ A chromosomal abnormality is any combination of chromosomes in an individual that is not XX, which denotes a biological female, or XY, which denotes a biological male.¹⁸ Examples of chromosomal abnormalities include XXY, known as Klinefelter syndrome, and X0, known as Turner syndrome.¹⁹

16. Tamar-Mattis, *supra* note 8, at 63 (detailing the variations in anatomy of intersex individuals); *see also* RICARDO GONZALEZ & BARBARA M. LUDWIKOWSKI, HANDBOOK OF UROLOGICAL DISEASES IN CHILDREN 158 (2011) (providing a thorough description of male and female genital anomalies, such as micropenis, penile agenesis, hypospadias, and urogenital sinus).

17. Kishka-Kamari Ford, “*First, Do No Harm*”—*The Fiction of Legal Parental Consent to Genital Normalizing Surgery on Intersexed Infants*, 19 YALE L. & POL’Y REV. 469, 470–71 (2001) (specifying the myriad intersex conditions). For a detailed, scientific discussion on intersex medical conditions, *see* Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278–92 (1999) (providing a thorough background on the biological components of intersexuality).

18. *See* Greenberg, *supra* note 17, at 278 (outlining human sex development from conception to birth and the deviations from typical chromosomal patterns); *see also* Dennis O’Neil, *Sex Chromosome Abnormalities*, anthro.palomar.edu/abnormal/abnormal_5.htm (last visited Mar 24, 2014) (reviewing the most common chromosomal anomalies observed in the human population).

19. *See* O’Neil, *supra* note 18. Men who have Klinefelter Syndrome inherit one or more additional X chromosomes and possess the chromosomal patterns XXY or XXXY. *Id.* Klinefelter Syndrome occurs in 1 of every 500–1000 male births and usually causes men to be slightly taller than average, have little to no body hair, and possess more feminine characteristics than men with a typical XY chromosomal pattern. *Id.* Turner Syndrome affects approximately one in 2000–5000 females. *Id.* Because women with Turner Syndrome have only one X chromosome, they usually develop a short stature,

Approximately 1 in 1500 births result in an intersex infant who has ambiguous genitalia requiring the attention of a medical expert specializing in sex differentiation.²⁰ Medical research has shown it is possible that nearly two percent of all live births result in deviations from the “ideal male or female.”²¹ Rather than accepting the notion that humans are not always completely male or female, society has attempted to reinforce strict sexual dimorphism by modifying those who threaten the legitimacy of the male-female sex binary.²²

B. History of Medical Responses to Intersex

The customary medical response to intersex newborns has been to surgically alter the non-conforming genitalia to create a more “normal” penis or vagina—even if this means ignoring the infant’s biological sex, internal reproductive organs, chromosomal pattern, or likelihood of developing a certain gender identity.²³ Traditionally, medical doctors have operated on boys born with an “inadequate” penis with the purpose of either making the genitalia appear “normal” as a male, or to make the child female by removing their phallus and

exceptionally small breasts, broad shoulders, and a propensity for thyroid disease, heart defects, and diabetes. *Id.*

20. Alice Domurat Dreger, “Ambiguous Sex”—or Ambivalent Medicine? *Ethical Issues in the Treatment of Intersexuality*, HASTINGS CENTER REP., May–June 1998, at 3, 26 (visiting the issue of frequency of intersex individuals); see also *How Common Is Intersex?*, INTERSEX SOC’Y OF N. AM., <http://www.isna.org/faq/frequency> (last visited Nov. 15, 2013) (estimating that one in 1500 to 2000 live births result in intersex children but many more individuals have subtler atypical sex characteristics which can go unnoticed until adolescence).

21. Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 161 (2000) (distinguishing the frequency of intersex newborns as two percent of all live births from the frequency of newborns receiving genital-normalizing surgery as 0.2% of all live births); see Tamar-Mattis, *supra* note 8, at 63 (noting the approximate number of intersex births).

22. Blackless et al., *supra* note 21, 161 (reflecting on society’s strict adherence to the assumption of two unambiguous sexes).

23. Tamar-Mattis, *supra* note 8, at 64 (referring to this medical response as the “concealment model” which encourages secrecy and denial of children’s intersex conditions); see *Crawford Complaint*, *supra* note 10, para. 46 (suggesting that the likelihood of developing a certain gender identity can be determined because the plaintiff’s doctors noted “high testosterone levels” and significant prenatal “testosterone imprinting” as factors that might indicate the plaintiff’s ultimate gender identity).

constructing a vagina.²⁴ Newborn girls who possess a clitoris that is deemed too large will undergo surgery to have their masculine genitalia shortened so that it is the “appropriate” size.²⁵ Unfortunately these surgical decisions rarely involve considerations of the child’s potential for sexual performance as an adult or their ability to have children.²⁶

The concept of assigning sex and gender via surgery has existed since the 1950s.²⁷ In light of Dr. John W. Money’s notorious “John/Joan” case study, doctors began routinely performing genital-normalization procedures during the early 1970s to resolve the “problem” of genitalia that do not clearly conform to the biological male or female sex.²⁸

C. The “John/Joan” Case Study

In 1972, in his book *Man & Woman, Boy & Girl*, Dr. John W. Money of Johns Hopkins University published a study with the hypothesis that psychosexual development is not inherent to

24. Dreger, *supra* note 20, at 28 (detailing the practice of genital-normalizing procedures); *see also* Ford, *supra* note 17, at 471 (noting that an “adequate” penis of a newborn male measures at least 2.5 centimeters when stretched out); *cf.* Comm. on Genetics, *Evaluation of the Newborn with Developmental Anomalies of the External Genitalia*, 106 *PEDIATRICS* 138, 139 (2000) (noting that medical attention is needed when a newborn male’s outstretched penis measures less than 2.0 centimeters). The Intersex Society of North America has created a “phall-o-meter” to serve as a visual representation of the arbitrary standards that determine sex. *See* PREVES, *supra* note 2, at 139, *available at* <http://alicedreger.com/phallometer.html>.

25. Dreger, *supra* note 20, at 28; Ford, *supra* note 17, at 471 (noting that a clitoris is too large if it exceeds more than 1.0 centimeter at birth).

26. Comm. on Genetics, *supra* note 24, at 139 (noting that genital-normalizing surgery is primarily concerned neither with adult orgasm potential nor fertility). *But see* Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 *PEDIATRICS* 488, 490–91 (2006) (suggesting that fertility potential ought to play a role in making sex determinations for some intersex conditions, but medical treatment must assign a gender to all intersex individuals).

27. Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 *MICH. J. GENDER & L.* 1, 2–3 (2000) (discussing the origins of genital-normalizing surgery in the 1950s); *see* Dreger, *supra* note 20, at 27 (claiming that the notion of gender assignment became tenable around the 1910s).

28. Beh & Diamond, *supra* note 27, at 16 (observing that the publication of Dr. Money’s “John/Joan” study in pediatric literature established the contemporary medical model for treating intersexuality); *see* Tamar-Mattis, *supra* note 8, at 64 (noting the normative underpinnings of Dr. Money’s theory found in the traditional and current medical treatment of intersexuality).

an individual but influenced by their surroundings.²⁹ Essentially, Dr. Money hypothesized that an infant with anomalous sex characteristics could have his or her genitals surgically altered to conform to a strict appearance of male or female.³⁰ He believed that this genital alteration, which is never revealed to the intersex individual, allows the child to develop a gender identity that matches the sex chosen by the surgeon.³¹

Dr. Money's study did not involve an intersex child but rather an infant named Bruce Reimer who was born biologically as a male and suffered severe trauma to his penis due to circumcision complications.³² In order to test his hypothesis, Dr. Money experimented with this tragedy and constructed female sex organs so Bruce could have normal-looking genitalia.³³ Dr. Money convinced Mr. and Mrs. Reimer that Bruce could actually be raised as a girl with "normal" genitalia and therefore have a "normal" life.³⁴ Under Dr. Money's theory, it was imperative "that once the sex was decided on, doctors and parents never

29. JOHN MONEY & ANKE A. EHRHARDT, *MAN & WOMAN, BOY & GIRL: THE DIFFERENTIATION AND DIMORPHISM OF GENDER IDENTITY FROM CONCEPTION TO MATURITY* (1972); see Tamar-Mattis, *supra* note 8, at 60 (articulating Dr. Money's theory that children do not necessarily develop gender identities that match their biological sex, but rather form gender identities that match the sex acknowledged by their family, peers, and medical professionals throughout childhood); see also Dreger, *supra* note 20, at 25 (asserting that this hypothesis also assumes that healthy psychosexual development depends on the appearance of genitalia).

30. Beh & Diamond, *supra* note 27, at 17–18 (noting that this theory provided a convenient solution to a precarious circumstance); see also Tamar-Mattis, *supra* note 8, at 64 (characterizing Dr. Money's theory as a way to mask the natural conditions of intersex children).

31. Beh & Diamond, *supra* note 27, at 17–18 (emphasizing that physicians do not clarify whether genital-normalizing surgery aims to help intersex individuals accept their childhood or be comfortable with their gender in adulthood); see also Tamar-Mattis, *supra* note 8, at 64 (highlighting secrecy as one of the central means to the desired gender identity under the "concealment model").

32. Beh & Diamond, *supra* note 27, at 6 (introducing the story behind the "John/Joan" case); see also Tamar-Mattis, *supra* note 8, at 59–60 (reporting the causes of Bruce's ambiguous genitalia).

33. See John Colapinto, *The True Story of John/Joan*, *ROLLING STONE*, Dec. 11, 1997, at 54, 55–56 (explaining that after previous medical professionals concluded that Bruce could not have "normal heterosexual relations" as an adult due to his deformed penis, Bruce's parents sought out Dr. Money upon learning of his expertise in gender transformation and psychology); see also Tamar-Mattis, *supra* note 8, at 59–60 (alleging that Dr. Money's research was incomplete and omitted the actual results of the study).

34. Colapinto, *supra* note 33, at 3 (recounting Dr. Money's belief that children were born psychosexually neutral and therefore able to adapt to assigned genders).

waver in their decision, for fear of introducing dangerous ambiguities into the child's mind."³⁵ In 1967, Mr. and Mrs. Reimer gave consent for genital-normalizing surgery on their son, and in less than a week they took home their "normalized" little girl, Brenda.³⁶

As time passed, Dr. Money reported Brenda Reimer's outcome as an unequivocal success.³⁷ This research led the medical community to adopt the theory that children are born psychosexually neutral and can adapt to the gender in which they are raised regardless of their biological sex.³⁸ This theory serves as the rationale for genital-normalizing surgery on intersex children.³⁹ Dr. Money's reports on the "John/Joan" case, however, concealed the reality that the attempt to raise the biological male "Bruce" as the surgically and socially constructed female "Brenda" was, in fact, a complete failure.⁴⁰ The truth is that Bruce Reimer never accepted the sex forced upon him by his parents and physicians.⁴¹ He identified as a boy

35. *Id.* (noting that this concept assumed the younger the child was, the more psychosexually neutral they were). Dr. Money recommended that sex reassignment be completed as early as possible, preferably within the first thirty months of the child's life. See Tamar-Mattis, *supra* note 8, at 64 (discussing the hypothesis that an early sex assignment strengthens the parent-child bond by providing the parents with a "normal" child as soon as possible).

36. See Colapinto, *supra* note 33, at 3 (explaining that Bruce was renamed after his surgery and raised as "Brenda" throughout his childhood); see also Tamar-Mattis, *supra* note 8, at 60 (recalling the early stages of the "John/Joan" case).

37. Beh & Diamond, *supra* note 27, at 17 (describing the omission of signs of Brenda's rejection of female identity from the publishing of her story); See Tamar-Mattis, *supra* note 8, at 60 n.7 (noting that this gender assignment surgery was reported as an achievement in the medical community).

38. Beh & Diamond, *supra* note 27, at 17 (indicating the "John/Joan" case was widely disseminated in medical literature after its 1972 publication); see also Dreger, *supra* note 20, at 25 (commenting on the large scale reports of Dr. Money's study).

39. Beh & Diamond, *supra* note 27, at 17-18 (noting the predominant standard of care for genitalia that was ambiguous, deformed, and unable to fulfill sexual function was to surgically create genitalia which could have normal adult sexual function). Standard practice in genital-normalizing surgery favors female sex determinations over male, unless there is good reason to make the child male. See Int'l Library of Ethics, Law, and the New Med., ETHICS AND INTERSEX, 208, 212 (Sharon E. Sytsma ed., 2006) (observing that the majority of intersex patients receive a female genitoplasty diagnosis but the operation is generally unsuccessful).

40. Colapinto, *supra* note 33, at 1 (describing the actual results of the "John/Joan" case study); see also Tamar-Mattis, *supra* note 8, at 61 (revealing that Dr. Money had lied about the successful transformation of Bruce to Brenda).

41. Colapinto, *supra* note 33, at 4-5; see Tamar-Mattis, *supra* note 8, at 60-61.

from early childhood, rejecting the idea that he was a girl.⁴² Bruce ripped off the dresses his mother gave him, he urinated standing up, and he expressed virtually no feminine traits in his mannerisms and social behavior.⁴³

When Bruce was fourteen years old, his parents revealed the truth to him about his botched circumcision and sex reassignment.⁴⁴ He immediately stopped wearing girls clothing and ceased his estrogen management.⁴⁵ By the time Bruce was sixteen, he had his breasts removed, a phallus constructed to replace his previous surgically fashioned vagina, and changed his name from Brenda to David.⁴⁶ Sadly, David Reimer ultimately committed suicide in May 2004 at age 38, finally succumbing to a lifelong struggle with depression.⁴⁷

Dr. Money's influence on the standard of care for intersex individuals persisted for nearly three decades despite people learning the true results of the "John/Joan" case in the early 1990s.⁴⁸ As the intersex community became more visible in the early 2000s, the medical community began to recognize the

42. See Colapinto, *supra* note 33, at 4–5 (demonstrating that the little girl, Brenda, always wanted to be a boy); see also Tamar-Mattis, *supra* note 8, at 60–61 (quoting Bruce Reimer as saying he was "just a boy with long hair and girl's clothes" to his psychologists during childhood).

43. See Colapinto, *supra* note 33, at 6–7 (recounting Bruce's childhood behavior as "Brenda" was boorish and he daydreamed of being a man with a mustache who owned a sports car); see also Dreger, *supra* note 20, at 25

44. Colapinto, *supra* note 33 at 7 (expressing that Bruce's parents could no longer keep their son's secret from him in good conscience); see Dreger, *supra* note 20, at 25 (confirming that Bruce readopted his male status upon learning the truth at fourteen years old).

45. Colapinto, *supra* note 33, at 8 (detailing Bruce's reaction to learning that he was born male); see Tamar-Mattis *supra* note 8, at 61 (noting that Bruce began living as a boy immediately after he learned of his genital-normalizing surgery).

46. Colapinto, *supra* note 33 at 8 (laying out the steps Bruce took to reclaim his male sex and gender); see Dreger, *supra* note 20, at 25 (observing that Bruce received several surgeries during his teenage years to become a man).

47. John Colapinto, *Gender Gap: What Were the Real Reasons Behind David Reimer's Suicide?*, SLATE, June 3, 2004, 3:58 PM, http://www.slate.com/articles/health_and_science/medical_examiner/2004/06/gender_gap.html (commenting on David Reimer's psychological, financial, and marital problems); see Tamar-Mattis, *supra* note 8, at 61 (noting David's choice to take his own life).

48. See *supra* Part I.C (discussing the lasting impact of the "John/Joan" case study even though the medical community became aware that its findings were completely distorted).

intersex advocacy movement.⁴⁹ The medical community in the United States started developing an approach to treating intersex individuals that shifted away from Dr. Money's theory by focusing on more aspects of the situation, including the intersex individual.⁵⁰

D. *Current Practice of Genital-Normalizing Surgery*

In 2000, the American Academy of Pediatrics ("AAP") declared that a child with ambiguous genitalia is a "social emergency" and such a diagnosis "require[s] urgent medical attention."⁵¹ The AAP directed medical professionals to inform parents that the child's "abnormal appearance can be corrected and the child [could be] raised as a boy or a girl as appropriate."⁵² This protocol embodies the flawed concept that immediate sex assignment is the optimal treatment for an intersex newborn because it promotes the unnecessary need to create genitalia that conform to the strict male-female binary and over-emphasizes allaying societal pressures and parental concerns.⁵³

The AAP modified its approach to genital-normalizing surgery on intersex infants in 2006.⁵⁴ The new approach acknowledges that "[t]he birth of an intersex child prompts a long-term management strategy that involves myriad

49. *See supra*, note 2 and accompanying text (acknowledging the progress of the intersex advocacy movement in the healthcare context at the start of the new millennium).

50. *Compare* Lee, *supra* note 26, at 488 (focusing on the interests of the *parents and the intersex child* as a single unit in conjunction with the advice of pediatric specialists), *with* Comm. on Genetics, *supra* note 24, at 138 (focusing on social concerns and solely on the needs of the intersex child's parents).

51. Comm. on Genetics, *supra* note 24, at 138 (expressing the medical community's primary opinion on and approach to intersexuality).

52. *Id.* (stressing the importance of healthcare professionals being empathetic with and attentive to the parents' anxieties and needs).

53. Beh & Diamond, *supra* note 27, at 17 (recalling the psychosexual assumption that immediately choosing a sex for the child, altering the child's genitalia to match that sex, and raising the child to identify with the gender of that sex, will result in a psychologically and socially stable development for the child); *see* Tamar-Mattis, *supra* note 8, at 71 (claiming that there is no scientific or medical study that shows physical or psychological benefits from genital-normalizing surgery).

54. *See* Lee, *supra* note 26 at 488 (reporting that improvements in patient management, surgical techniques, and diagnosis methods have affected the way physicians treat intersex individuals).

professionals working with the family.”⁵⁵ The AAP’s new consensus on treating children with intersex conditions suggests that “normalizing” the child is not an urgent decision, but a process that must consider psychological issues and recognize patient autonomy.⁵⁶ Further, it represents the medical community’s retreat from the belief that a child’s psychosexual development is determined by the child’s genitalia and gender assigned by the child’s doctor and parents.⁵⁷ Rather, the 2006 approach recognizes that factors such as androgen exposure, brain structure, sex chromosomes, family dynamics, and social experiences influence a child’s psychosexual development.⁵⁸ Notwithstanding the advances reflected in this approach to intersexuality and intersex autonomy, Dr. Money’s theory still has clout in the medical community.⁵⁹

The 2006 AAP Consensus uses language that may appease intersex patient advocates by discussing the risk of “gender dissatisfaction” in adulthood, the essential need for “open communication with patients and family,” and the importance of preserving “erectile function and the innervation of the clitoris.”⁶⁰ But, this language is unlikely to have more than a nominal impact on genital-normalizing procedures as the Consensus continues to direct doctors to rely on the 1996 AAP guidelines encouraging early reconstruction of genitals.⁶¹ These

55. Compare *id.* at 488 (focusing on the interests of the *parents and the intersex child* as a single unit in conjunction with the advice of pediatric specialists), with Comm. on Genetics, *supra* note 24, at 138 (focusing on social concerns and solely on the needs of the intersex child’s parents).

56. Lee, *supra* note 26, at 489–90 (using language that demonstrates a seemingly cautious approach to the treatment of intersex infants).

57. *Id.* at 489 (providing a more comprehensive explanation and understanding of intersex conditions).

58. *Id.* (defining “psychosexual development” as a concept composed of gender identity, gender role, and sexual orientation); cf. Comm. on Genetics, *supra* note 24, at 138 (promoting the idea that the appearance of genitals and social upbringing are determinative of gender identity).

59. See *id.* (emphasizing early genital-normalizing procedures on children with ambiguous genitalia).

60. *Id.* at 489–91.

61. *Id.* at 492 (suggesting that genital surgery for cosmetic reasons is unnecessary and ineffective at strengthening a parent’s bonds with his or her child, but nonetheless advocating for guidelines that encourage early surgery on intersex infants); see also Section on Urology, *Timing of Elective Surgery on the Genitalia of Male Children with Particular Reference to the Risks, Benefits, and Psychological Effects of Surgery and Anesthesia*,

1996 guidelines embrace the belief popularized by Dr. Money that children are psychosexually neutral at birth and that immediate treatment will create a “normal” life for the child.⁶² Because physicians perform one hundred to two hundred genital-normalizing surgeries on infants each year, this contradictory protocol is relied upon by US surgeons, on average, two or more times every week.⁶³

E. *Intersex Voices*

A significant portion of the intersex population is dissatisfied with the genital-normalizing surgery they were subjected to in early childhood and report psychological and sexual problems throughout adulthood.⁶⁴ One intersex individual exhorts: “Wait for the babies to be able to say who they are. They are destroying lives, that’s what they are doing.”⁶⁵

97 PEDIATRICS 590, 139 (1996) (advocating for immediate treatment that mimics the methods developed by Dr. Money’s “John/Joan” case study).

62. See Section on Urology, *supra* note 61, at 139 (stating that “children whose genetic sexes are not clearly reflected in external genitalia (i.e., hermaphroditism) can be raised successfully as members of either sex if the process begins before the age of 2 1/2 years”).

63. Ford, *supra* note 17, at 469 (providing the frequency of intersex treatment that results in genital-normalizing procedures).

64. The 2012 Köhler study found that forty-seven percent of intersex individuals were dissatisfied with their surgeries overall, and concluded that there should be a decrease in genital-normalizing procedures and such surgery should be performed only when the individual can give consent. See Birgit Köhler et al., *Satisfaction with Genital Surgery and Sexual Life of Adults with XY Disorders of Sex Development: Results from the German Clinical Evaluation Study*, J. CLINICAL ENDOCRINOLOGY & METABOLISM, Feb. 2012, at 10-11. The 2004 Meyer-Bahlburg study, though, stated that only thirty-two percent of intersex adults are actually dissatisfied with their gender after having undergone genital-normalizing procedures as a child. See H. F. L. Meyer-Bahlburg et al., *Attitudes of Adult 46, XY Intersex Persons to Clinical Management Policies*, 171 J. Urology 1615 (2004). The conclusions of the 2004 Meyer-Bahlburg study, however, were refuted by Morgan Holmes in her book *Intersex: A Perilous Difference*, discussed above. HOLMES, *supra* note 7, at 57-59. Holmes questioned the validity of the 2004 Meyer-Bahlburg study due to its inherent bias with weighting of questions, limited survey population, and insufficient data to create a diversified analysis of the survey population. *Id.*

65. See McKenzie Martin, *Living a Lie: Local Intersex Woman Shares Her Story*, Nov. 13, 2009, <http://www.kktv.com/home/headlines/69933377.html> (last visited Nov. 8, 2013) (quoting Debbie Wuco, an intersex woman forced to live as a man due to genital-normalizing surgery, as she speaks out against the practice of early sex assignment surgery and the psychological wounds it imposes); Stephanie Stevens, *Living A Lie: An Intersex Woman Shares Her Story*, YOUTUBE (Nov. 13, 2009), <https://www.youtube.com/watch?v=jbwR0inBd8s> (broadcasting a local news segment featuring Debbie Wuco and her intersex story).

The destruction referred to is the mismatch between one's gender identity and one's sex.⁶⁶ Early sex assignment surgery for intersex individuals also has been shown to create adult risks of sexual anxiety, impotence, minimal clitoral arousal, and overall dissatisfaction with one's sex life.⁶⁷

As an example, genital-normalizing surgery greatly affected Max Beck, whose experience is not atypical.⁶⁸ Max was born with a rudimentary phallus and a scrotalized labia.⁶⁹ Doctors made the decision to remove Max's phallus and make him into a female, and they instructed his parents to raise him as a girl.⁷⁰ Max became "Judy," and as Max explained, Judy developed into a "rough-and-tumble tomboy" experiencing adolescence "with no physical sense of self" and as "a sort of sexual Frankenstein's monster."⁷¹ The doctors who managed Judy's hormone treatment often told Max that he was an "unfinished" girl, and they performed a final vaginoplasty on Max during his teenage years.⁷²

66. See Colapinto, *supra* note 33, at 8 (detailing the angst experienced by David Reimer from being forced to live as an anatomical girl from infancy while identifying with the male gender since childhood); see also Tamar-Mattis, *supra* note 8, at 68–69 (highlighting the trauma faced by intersex individuals who unknowingly undergo a genital-normalizing procedure and develop a gender identity that does not match their sex).

67. See Köhler, *supra* note 64 (observing markedly high rates of sexual problems in intersex individuals with desire, arousal, and painful intercourse); cf. Dreger, *supra* note 20, at 29 (summarizing a study that suggests males with micropenis do not need to undergo genital-normalizing procedures to enjoy sexual function as an adult).

68. See Max Beck, *My Life as an Intersexual*, Oct. 30, 2001, <http://www.pbs.org/wgbh/nova/body/intersexual-life.html> (last visited Nov. 8, 2013) (telling the story of an intersex individual made to live as a woman because of genital-normalizing surgery but who identified as a man in adulthood); see also *Understanding the Gender Binary: How Does the Two-Gender System Impact You?*, *Challenge Sex Binary*, GENEDERBINARY, <http://genderbinary.wikidot.com/challenge-sex-binary> (last visited Feb. 1, 2014) [hereinafter *Challenge Sex Binary*] (sharing Max Beck's trauma and triumphs as an intersexual).

69. Beck, *supra* note 68 (revealing Max's psychological, physical, and emotional damage caused by his genital-normalizing surgery performed during infancy); see *Challenge Sex Binary*, *supra* note 68 (noting Max's intersex condition).

70. Beck, *supra* note 68 (reviewing Max's medical history); see *Challenge Sex Binary*, *supra* note 68 (discussing parental involvement in the sex assignment process).

71. Beck, *supra* note 68 (providing an idea of how genital-normalizing procedures affect intersexual individuals); see *Challenge Sex Binary*, *supra* note 68 (quoting Max Beck as he revisits his adolescence).

72. Beck, *supra* note 68 (describing the medical treatment intersexual children must receive in order to maintain their assigned sex); see *Challenge Sex Binary*, *supra* note 68 (remembering Max's teenage years).

In adulthood, Max identified as a lesbian because he had no reason to believe he was not a woman.⁷³ Although Max felt empowered through identification with the lesbian community, his self-loathing continued, stemming from the realization that he could never be intimate with women because they would notice his disfigured genitalia.⁷⁴ Max attempted suicide at the age of twenty-one and endured years of depression due to the disconnect between his psychological and corporal self.⁷⁵

Max discovered what had happened to him as an infant when his therapist obtained medical records revealing his intersex condition at birth.⁷⁶ Max described himself as feeling like a “freak” and a “monster” as this revelation stripped him of his lesbian identity.⁷⁷ Over time, Max became involved with the intersex community and decided to transition from female to male.⁷⁸ He married Tamara Alexander in 2000, and identified as an intersexual male until his passing in 2008 from cancer.⁷⁹

73. Beck, *supra* note 68 (illustrating the identity problems created by genital-normalizing surgery); see *Challenge Sex Binary*, *supra* note 68 (showing how keeping an intersex condition a secret from an individual can cause confusion and torment in regards to gender identity and sexuality).

74. Beck, *supra* note 68 (detailing the physical and emotional harms associated with mismatching an individual’s sex and gender identity); see *Challenge Sex Binary*, *supra* note 68 (noting Max’s development of a sexual identity).

75. Beck, *supra* note 68 (exposing the depth of Max’s personal struggle with his sexual and psychological identity); see *Challenge Sex Binary*, *supra* note 68 (acknowledging the dark side of genital-normalizing surgery on intersexuals).

76. Beck, *supra* note 68 (explaining how Max came to learn of his true identity); see *Challenge Sex Binary*, *supra* note 68 (reiterating that sex assignment surgeries are kept secret from intersex children even into adulthood).

77. Beck, *supra* note 68 (noting the continued trauma Max experienced); see *Challenge Sex Binary*, *supra* note 68 (noting Max’s intersex condition).

78. Beck, *supra* note 68 (discussing Max’s personal decision to identify as an intersex individual and transition into the sex he felt most comfortable with); see *Challenge Sex Binary*, *supra* note 68 (reflecting a common intersex narrative where the individual transitions into their true gender in adulthood).

79. Beck, *supra* note 68 (discussing Max’s adult life after coming into his identity as an intersexual); see Alice Dreger, *Bye, Max. (We Already Miss You.)*, Feb. 4, 2008, <http://alicedreger.com/Max.html> (reminiscing Max’s life and discussing his lost battle with cancer). To read Max’s personal blog documenting his final months fighting cancer, see Max Beck, *I am a Cancer Survivor*, <http://home.mindspring.com/~maxyxo/index.html> (reflecting back on his accomplishments, family, and goals, and detailing the struggles of receiving cancer treatment).

Although intersexuality is rare and not a new phenomenon, it still presents important social, medical, and legal issues.⁸⁰ The theories that characterized the traditional approach to treating infants with ambiguous genitalia remain the primary reasons for the current practice of genital-normalizing surgery.⁸¹ Many individuals have undergone early sex assignment surgery, and the *Crawford* case in South Carolina addresses the present concerns created by altering children's genitalia, such as medical ethics, individual autonomy, and reproductive rights.⁸²

II. INTERNATIONAL JURISPRUDENCE & THE UNITED STATES' COMMENCING CASE ON INTERSEX ISSUES

There are only a handful of legal decisions in the world that involve sex assignment surgery and intersex issues.⁸³ Part II.A summarizes the 1995 and 1999 Colombian court decisions, which established the unprecedented protection of intersex minors from parental consent to genital-normalizing surgeries. Part II.B then examines Germany's 2007 *Völling* decision, which parallels the holdings of the Colombian cases. Part II.C introduces the facts and legal claims of the groundbreaking intersex lawsuit in the United States, the *Crawford* case. Lastly, Part II.D concludes by discussing several alternative public policy options administered by various nations that promote the rights of intersex individuals.

A. The Constitutional Court of Colombia

Throughout the 1990s, Colombia issued landmark rulings in cases regarding sex assignment surgery and intersex

80. See *supra* notes 59–66 and accompanying text (discussing the AAP's conflicting medical guidelines and the social and sexual problems faced by intersex individuals who receive genital-normalizing surgery).

81. See *supra*, notes 58–62 and accompanying text (revealing that the flawed theory that initially caused physicians to regularly perform genital-normalizing surgery lingers in AAP guidelines).

82. See *supra* Part I.E (presenting intersex narratives).

83. See Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J. L. & MED. 41, 49 (2004) (noting that Colombia is the only country in the world to have addressed the medical treatment of intersex infants through its judiciary); see also Julie A. Greenberg & Cheryl Chase, *Background of Colombia Decisions*, Intersex SOC'Y OF N. AM., <http://www.isna.org/node/21> (last visited Jan. 4, 2013) (discussing the consequences of the unique 1995 and 1999 Colombian decisions).

children.⁸⁴ The first of these cases, *The Decision of Y.Y.*, had broad implications for intersex autonomy and protected all individuals from any genital-normalizing procedure.⁸⁵ Four years later, *The Decision of X.X.* narrowed this broad protection to only apply to intersex minors capable of making medical decisions for themselves.⁸⁶ In the same year the Constitutional Court of Colombia, in *The Decision of N.N.*, clarified what information doctors must disclose to parents to ensure they are able to give informed consent to genital-normalizing surgery on their intersex children, who, due to their young age, cannot make competent medical decisions.⁸⁷

1. *The Decision of Y.Y.*

In 1995, the Constitutional Court of Colombia became the first tribunal to issue a decision on the rights of an intersex

84. See Haas, *supra* note 83, at 43 (contrasting the fact that the United States has not seen a case involving genital-normalizing surgery with Colombia, which has decided multiple cases regarding intersex issues and sex assignment procedures); see also Greenberg & Chase, *supra* note 83 (recognizing the historical significance of Colombia's rulings).

85. See generally Corte Constitucional [C.C.] [Constitutional Court], octubre 23, 1995, Sentencia T-477/95, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) (holding that only the individual can consent to a surgery that determines his or her gender regardless of the individual's age); see also Haas, *supra* note 83, (articulating the Court's ruling in *The Decision of Y.Y.*, which requires the patient's own informed consent for genital-normalizing procedures).

86. See generally Corte Constitucional [C.C.] [Constitutional Court], Sentencia SU-337/99, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) (holding that parents cannot consent to sex assignment surgery on an intersex child who can make competent medical decisions but can under certain circumstances give consent for intersex children too young to consent to medical procedures); see also Greenberg & Chase, *supra* note 83 (interpreting *The Decision of X.X.* to allow parental informed consent to genital-normalizing surgery depending on the urgency of the surgery, riskiness of the surgery, and the autonomy of the child).

87. See Haas, *supra* note 83, at 52 (explaining that *The Decision of N.N.* required a heightened standard of parental informed consent); *The Court*, CONSTITUTIONAL COURT OF COLOMBIA, <http://www.corteconstitucional.gov.co/lacorte/> (last visited Nov. 20, 2013) (explaining that the Constitutional Court of Colombia is the highest entity in the nation's judicial branch and serves to safeguard the integrity and supremacy of the Colombian Constitution). See generally Corte Constitucional [C.C.] [Constitutional Court], Sentencia T-551/99, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) (holding that parental informed consent must encompass a knowledge of intersex conditions and alternative treatment options among other things).

plaintiff.⁸⁸ In *The Decision of Y.Y.*, a teenage boy, whose name was not identified, filed suit against the physicians who operated on him as an infant.⁸⁹ Like David Reimer in the “John/Joan” case, a botched circumcision had left the plaintiff with a deformed penis.⁹⁰ His parents, therefore, had consented to “any treatment that would improve their son’s situation including a sex change.”⁹¹ On April 21, 1981, doctors had operated on the plaintiff to “correct” his traumatized penis by changing his sex and giving him “normal” female parts.⁹²

The goal of the surgery had been to provide the child with the opportunity to have sexual intercourse as an adult and thereby live a “normal” life.⁹³ Just like David Reimer, the plaintiff never developed a female gender identity and experienced significant emotional trauma from being forced to live in a sexual identity chosen for him.⁹⁴ He grew up constantly questioning his sexual identity and felt anguished living as a female.⁹⁵ As a teenager, upon learning of the surgery performed on him as a child, the plaintiff sued the hospital and the physicians who performed the surgery.⁹⁶

88. See Kate Haas, *supra* note 83, at 49 (2004) (framing the timeline of Colombia’s decisions on genital-normalizing surgery); see also Greenberg & Chase, *supra* note 83 (discussing the significance of this landmark ruling).

89. See Constitutional Court, Case T-477/95, (Colom.), *supra* note 85 (withholding the name of the plaintiff in order to protect his identity); see also Greenberg & Chase, *supra* note 83 (identifying the plaintiff without disclosing his name).

90. Constitutional Court, Case T-477/95, (Colom.), *supra* note 85, at 1.2 (reviewing the physical history of the plaintiff’s genitalia); see also Haas, *supra* note 83, at 49 (noting the plaintiff was accidentally castrated during circumcision).

91. Constitutional Court, Case T-477/95, (Colom.), *supra* note 85, at 1.2 (translated by author) (demonstrating the parents’ fears and desire to “correct” their son’s genitalia at any cost).

92. *Id.* (translated by author) (summarizing the decision to make Y.Y. a female).

93. *Id.* (translated by author) (discussing the plaintiff’s genital-normalizing surgery); Haas, *supra* note 83, at 94 (explaining the goals of the sex assignment surgery).

94. Constitutional Court, Case T-477/95, (Colom.), *supra* note 85, at 5.1 (detailing the plaintiff’s psychological struggles exhibited by his alarming behavior when others treated him as a female).

95. *Id.* at 5.1 (noting that the plaintiff often felt isolated, confused, and depressed because of the mismatch between his gender identity and sex).

96. See *id.* at 2 (pointing out the plaintiff’s desire to be remedied for the harm caused by the sex assignment surgery).

The Constitutional Court of Colombia held that the doctors violated Y.Y.'s constitutional rights by performing genital-normalizing surgery.⁹⁷ More specifically, the Court held the physicians liable for violating the minor's constitutional right to identity.⁹⁸ The decision described this right to identity as "part of human dignity."⁹⁹ The Court also held that each individual holds individual rights closely related to one's autonomy.¹⁰⁰ The Court reasoned that autonomy allows for self-determination, which in turn allows the individual to develop their identity freely.¹⁰¹

Citing to Article 8 of the United Nations Convention on the Rights of the Child, the Court emphasized the State's role in protecting the identity of children.¹⁰² The Court focused on the Convention's principle that a State must "provid[e] appropriate assistance" to children who have been illegally deprived of their

97. *Id.* at 8 (characterizing the procedure as a deprivation of the plaintiff's fundamental rights to identity and autonomy).

98. *Id.* (asserting the fundamental rights at stake are an individual's right to identity and dignity); see Greenberg & Chase, *supra* note 83 (discussing the rights to develop one's own personality and to define one's sexuality as aspects of one's right to identity).

99. Constitutional Court, Case T-477/95, (Colom.), *supra* note 85, at 15.1 (translated by author) (depicting a circular chain of fundamental rights by reasoning that human dignity encompasses the right to identity).

100. *Id.* (articulating that the right to identity bestows rights affecting one's autonomy, which protects the right to self-determination, which allows one to develop one's personhood – or one's identity and in essence part of one's human dignity).

101. *Id.* (discussing freedoms that inherently allow for individuals to exercise their fundamental rights).

102. *Id.* at 11 (relying on the UN Convention on the Rights of the Child to stress the importance of developing one's individual identity and the duty of the State to protect a child's autonomy). Article Eight of the UN Convention on the Rights of the Child states:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

United Nations Convention on the Rights of the Child art. 8, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. doc A/44/736 (1989) [hereinafter UN Convention on the Rights of the Child], available at <http://www.ohchr.org/EN/Professional Interest/Pages/CRC.aspx>.

identity, and declared that the physicians had violated Y.Y.'s rights.¹⁰³

The Court further held that sex operations, without consent, violate an individual's right to develop his/her own sexual identity.¹⁰⁴ *The Decision of Y.Y.*, therefore, established that only the individual on whom gender assignment surgery will be performed can give consent to the surgery, regardless of the age of the individual.¹⁰⁵ As a result, this case established a moratorium in Colombia on the practice of genital-normalizing surgery on infants and young children until they are old enough to consent to surgery on their own.¹⁰⁶

2. *The Decision of X.X.*

In the aftermath of *The Decision of Y.Y.*, the Colombian Constitutional Court issued two rulings in 1999 involving intersex children—*The Decision of X.X.* and *The Decision of N.N.*¹⁰⁷ Both teams of doctors in these cases had initially planned to perform genital-normalizing operations during infancy, but

103. Constitutional Court, Case T-477/95, (Colom.), *supra* note 85, at 18.1 (translated by author) (upholding Colombia's ratification of the UN Convention on the Rights of the Child as binding law).

104. Constitutional Court, Case T-477/95, (Colom.), *supra* note 85, at 15.1 (recognizing that sexual identity is an autonomous decision that is a part of one's fundamental right to develop their identity).

105. *Id.* at 15 (holding that all persons must be allowed to decide for themselves whether they want to alter their sex or keep their natural genitalia).

106. *See* Haas, *supra* note 83, at 99 (observing that after *The Decision of Y.Y.*, physicians still offered genital-normalizing surgery as a treatment method, but they would not perform these surgeries on children with ambiguous genitalia even with consenting parents); *see also* Greenberg & Chase, *supra* note 83 (noting that physicians mentioned genital-normalizing surgery with parents as a treatment option for intersex infants but would not use this treatment because of *The Decision of Y.Y.*).

107. *See generally* Corte Constitucional [C.C.] [Constitutional Court], Sentencia SU-337/99, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], Sentencia T-551/99, Gaceta de la Corte Constitucional [G.C.C.] (Colom.). The Constitutional Court of Colombia refers to the children as the minor "X.X." and the minor "N.N." in order to protect their identity. When the court delivered these decisions, both of the children had already begun to develop a female gender identity, and the court uses feminine pronouns when referring to the minors throughout the opinions. This Note also uses female pronouns when referring to the minors in these cases to respect their gender identities. For an English translation of the Court's opinion in *The Decision of X.X.*, see *The Rights of Intersexed Infants and Children: Decision of the Colombian Constitutional Court, Bogota, Colombia, 12 May 1999* (Nohemy Solórzano-Thompson trans.), in *TRANSGENDER RIGHTS*, *supra* note 2, at 122–38 [hereinafter *Translation of the X.X. Decision*].

then made the decision to postpone the surgeries until the children became older and had developed gender identities.¹⁰⁸ Although the parents were pressuring the physicians to perform genital-normalizing surgery, the physicians refused to operate on children who could not consent in accordance with the Court's 1995 holding in *The Decision of Y.Y.*¹⁰⁹

In May 1999, the Court, in *The Decision of X.X.*, held that a parent's decision to subject their children to genital-normalizing surgery violates constitutional rights guaranteed to children and the State by the Colombian Constitution.¹¹⁰ The Court relied heavily on Article 18 of The United Nations Convention on the Rights of the Child, which encourages countries to ensure that parental actions take into account the best interests of their children.¹¹¹ The decision balanced a parent's right to make decisions on behalf of their child with a child's right to be emancipated from parental decisions that are not in the best interests of the child.¹¹² By declaring that children "possess their own individuality and dignity, and constitute a developing autonomy," the Court created a basis for establishing legal rights for intersex children from the potential harms of a procedure that permanently alters their genitalia.¹¹³

108. See Constitutional Court, Case SU-337/99, (Colom.), *supra* note 86 (observing Colombian physicians' decisions in accordance with *The Decision of Y.Y.*). *Translation of the X.X. Decision*, *supra* note 107, at 122 (describing the background for *The Decision of X.X.*).

109. Constitutional Court, Case SU-337/99, (Colom.), *supra* note 86 (expressing the possible prejudice of X.X.'s parents in forcing their child to have their genitals altered).

110. See Constitutional Court, Case SU-337/99, (Colom.), *supra* note 86, at 71, 77 (declaring that the Article 44 of the Colombian Constitution confers an obligation to the State and society "to assist and protect the child in order to guarantee their harmonious and complete development and the full exercise of their rights").

111. *Id.* at 68, 77 (utilizing the text from the UN Convention on the Rights of the Child to hold the State to a higher standard of protecting minors).

112. *Id.* at 68 (acknowledging the parent's constitutional right to control their home with the State's obligation to ensure parents act upon the best interest of the child); see Holmes, *supra* note 2, at 108 (suggesting that children should be liberated from their parents the more the parents or guardians express prejudice towards their child or an inability to understand their child's situation).

113. *Translation of the X.X. Decision*, *supra* note 107, at 123; see Constitutional Court, Case SU-337/99, (Colom.), *supra* note 86, at 68 (asserting that children are not simply the property of their parents and must have their best interests considered); see also Holmes, *supra* note 2, at 108, 111 (interpreting the Court's use of "developing autonomy" as valuing the autonomy and future well-being of the child). Holmes notes

The Decision of X.X. describes genital-normalizing surgery as lacking urgency, risky, invasive, and ambivalent to health.¹¹⁴ The Court also recognized that parents are often unable to comprehend the idea of genital ambiguity and can be blinded by their own fears and prejudices.¹¹⁵ This inevitably results in a decision to normalize the child as quickly as possible without a true concern for the best interests of the child.¹¹⁶ When parents discover their child has ambiguous genitalia, medical professionals and parents undermine true informed consent by assuming that having the child's genitals "fixed" is in the best interests of the child.¹¹⁷ The Court introduced the idea of a heightened standard for informed consent by declaring that valid informed consent given by parents must be "qualified and persistent."¹¹⁸ The Court, however, failed to articulate the meaning of "qualified and persistent" informed consent.¹¹⁹

The State's interest in protecting the child's best interests ultimately became the justification for denying the mother's

that the Court's use of the language "a developing autonomy" does not imply that children are completely independent from their parents, but rather should be afforded freedom from their parents in certain circumstances.

114. See *Translation of the X.X. Decision*, *supra* note 107, at 123–24; see also Constitutional Court, Case SU-337/99, (Colom.), *supra* note 86, at 68 (expressing that genital-normalizing surgery is not urgent for any medical reason and provides no health benefits to the child).

115. See Constitutional Court, Case SU-337/99, (Colom.), *supra* note 86, at 79 (alleging that parental opinions on genital ambiguity are rarely developed free from the influence of outside sources).

116. See *id.* (contending that parents with intersex children endure severe trauma from not understanding their child's condition, desperately wanting to normalize the child, and because our society does not openly discuss issues such as "hermaphroditism"); see also Tamar-Mattis, *supra* note 8, at 87. (noting that culturally-biased recommendations and medical professionals acting outside of their expertise contribute to a decision that does not concern the best interests of the child).

117. Constitutional Court, Case SU-337/99, (Colom.), *supra* note 86, at 79 (conjecturing that infants with ambiguous genitalia are perhaps subjected to discrimination from their own parents); see Tamar-Mattis, *supra* note 8, at 86 (noting that genital-normalizing surgery is often presented to parents by doctors in a way that suggests the procedure is a foregone conclusion).

118. See *Translation of the X.X. Decision*, *supra* note 107, at 131; see also Constitutional Court, Case SU-337/99, (Colom.), *supra* note 86, at 83 (mentioning the concept of "qualified and persistent" consent in the context of parental informed consent for genital-normalizing procedures).

119. See Constitutional Court, Case T-551/99, (Colom.), *supra* note 87, at 19 (translated by author) (stating that the Court in *The Decision of X.X.* did not discuss the definition or requirements of "qualified and persistent" parental informed consent because X.X.'s mother could not consent on her behalf under any circumstances).

request for an order to disambiguate X.X.'s genitalia.¹²⁰ Granting protection to the intersex minor, X.X., the Constitutional Court stated, "it is the minor who should decide on her gender identity . . . [T]he Court will protect the minor's right to freely develop her identity and equality"¹²¹ This decision offers legal recognition of an intersex child's autonomy and identity and acknowledges the potential inadequacies of parental consent as authorization for sex assignment surgery on intersex children.¹²²

3. *The Decision of N.N.*

Three months after *The Decision of X.X.*, the Constitutional Court of Colombia maintained the autonomy of an intersex child in *The Decision of N.N.*¹²³ In this case, N.N. was a two-year-old intersex child unable to give competent medical consent.¹²⁴ According to *The Decision of X.X.*, parents could give permission for the normalization of their child's genitals as long as the informed consent was "qualified and persistent."¹²⁵ The Court failed to articulate this standard in *The Decision of X.X.*, but it did so in *The Decision of N.N.*¹²⁶ The N.N. Court declared that "qualified and persistent" consent exists when parents are given

120. Constitutional Court, Case SU-337/99, (Colom.), *supra* note 86, at 77 (upholding the State's duty under the UN Convention on the Rights of the Child in order to protect the best interests of the child).

121. *See Translation of the X.X. Decision*, *supra* note 107, at 136 (explaining why the mother's request for her daughter's surgery was denied).

122. Constitutional Court, Case SU-337/99, (Colom.), *supra* note 86, at 79, 89 (advocating for the rights of the minor who had not consented to surgery while questioning the intentions of the parent's desire to disambiguate their child's genitalia). *See also* Holmes, *supra* note 2, at 103 (concluding that the Constitutional Court of Colombia suggested intersex children are entitled to special protection from prejudice and parental consent that does not concern the best interests of the child).

123. *See* Constitutional Court, Case T-551/99, (Colom.), *supra* note 87 (denying the parent's petition for genital-normalizing surgery to be performed on the child).

124. Constitutional Court, Case T-551/99, (Colom.), *supra* note 87, 15 (disclosing the age of the intersex minor).

125. *Id.* at 15 (addressing the Court's previous ruling in *The Decision of X.X.* that articulated "qualified and persistent" consent); *see Translation of the X.X. Decision*, *supra* note 107, at 130-31 (reconciling the parent's and child's rights to achieve an equilibrium that creates a consensual decision which considers the best interests of the child).

126. Constitutional Court, Case T-551/99, (Colom.), *supra* note 87, at 22 (announcing the "qualified and persistent" consent standard because N.N. could not give competent medical consent, therefore her parents could have consented for her).

detailed information about the advantages and disadvantages of surgically altering their child's genitalia, are allowed ample periods of time to consider the alternatives to genital-normalizing surgery, and make decisions in consideration of their child's best interests.¹²⁷

In *The Decision of N.N.*, “qualified and persistent” consent did not exist because N.N.'s parents were led to believe that genital-normalizing surgery was the only option for their daughter.¹²⁸ The parents did not examine alternative options to surgery; therefore, their decision did not consider the best interests of the child.¹²⁹ This decision promotes the autonomy of intersex individuals by valuing the child's fundamental right to sexual identity over parents' and doctors' genital preferences.¹³⁰ *The Decision of N.N.* requires a heightened standard of informed consent and serves as precedent for Colombian families making decisions regarding children with intersex conditions who cannot make medical decisions for themselves.¹³¹ Further, the Court promotes diversity by making a place for intersex individuals in society.¹³² As stated in the conclusion of the opinion, “it is the duty of all of us to listen to these people and not only to learn to live with them but to learn from them.”¹³³

127. *Id.* (translated by author) (outlining the new standard of informed consent for genital-normalizing surgery on infants); *see also* Haas, *supra* note 83, at 53 (noting that “qualified and persistent” consent truly concerns the best interests of the child).

128. Constitutional Court, Case T-551/99, (Colom.), *supra* note 87, at 29–30 (deciding that the parent's consent was invalid because they were not provided with adequate information).

129. *Id.* (applying a strict application of the “qualified and persistent” rule). Haas, *supra* note 83, at 52–53 (reiterating the invalid parental consent for N.N. because of the lack of comprehension as to the implications of such a surgery).

130. Constitutional Court, Case T-551/99, (Colom.), *supra* note 87, at 10 (requiring a very high standard of informed consent so that the child's autonomy is protected).

131. Greenberg & Chase, *supra* note 83 (concluding that *The Decision of N.N.* forces parents in Colombia to be informed of accurate information, germane risks, and alternative options for sex assignment surgery). *But see* Haas, *supra* note 83 (concluding *The Decision of N.N.* weakens the holding of the decision in *The Decision of X.X.* by making clear only children five years of age or older can escape parental “qualified and persistent” consent to genital-normalizing surgery).

132. Constitutional Court, Case T-551/99, (Colom.), *supra* note 87, at 30 (recognizing that intersex autonomy is more important than the preservation of gender norms).

133. *Id.* (translated by author) (quoting Dr. William Reiner to emphasize the importance of diversity in society and of understanding marginalized communities).

In sum, the Constitutional Court of Colombia in *The Decision of Y.Y.* concluded that doctors may not perform sex assignment surgery on any individual unless there is consent.¹³⁴ Four years later, the Court in *The Decision of X.X.* retreated from this broad holding by declaring that parents can give consent for children who are not old enough to make competent decisions as long as the consent is “qualified and persistent.”¹³⁵ *The Decision of N.N.* then affirmed *The Decision of X.X.* by holding that parents can only give consent to genital-normalizing surgery for children too young to make medical decisions and outlined the requirements for “qualified and persistent” parental consent.¹³⁶

B. *The Cologne Regional Court of Germany*

In 2008, Germany’s Cologne Regional Court decided *Völling*, a case involving an operation that determined the sex of Christiane Völling without her consent.¹³⁷ The *Völling* decision recognized the social and legal consequences of the surgeon’s actions on Christiane Völling.¹³⁸ Christiane Völling had been born with ambiguous genitalia yet had been raised as a boy.¹³⁹

Dr. Reiner is physician in the Division of Pediatric Urology and the Division of Child Psychiatry at Johns Hopkins University. He is also a professor of Pediatrics at the University of Oklahoma Health Sciences Center specializing in intersex conditions. *Ethics of Gender Assignment*, INTERSEX SOC’Y OF N. AM., <http://www.isna.org/~library/~reinerprecepts> (last visited Jan. 4, 2013) (providing biographies of prominent intersex advocates in the United States).

134. See Constitutional Court, Case T-477/95, (Colom.), *supra* note 85 (declaring that only the individual himself can give consent to a medical procedure that determines that individual’s sex or gender).

135. See Constitutional Court, Case SU-337/99, (Colom.), *supra* note 86 (holding that an eight-year-old child deserves protection from the potential harms of parental consent to genital-normalizing surgery).

136. See Constitutional Court, Case T-551/99, (Colom.), *supra* note 87 (concluding that parents cannot give the requisite “qualified and persistent” consent necessary for assigning a sex to their two-year-old child without being informed of alternative intersex treatment options).

137. See *generally* Kölner Landgericht [Cologne District Court], 25 O 179/07, 06.02.2008 (holding that a surgeon violated the plaintiff’s fundamental rights to self-determination and to bodily integrity by removing the plaintiff’s sex organs without her consent).

138. See *id.* at 2 (noting that not only did the defendant’s actions deny the plaintiff’s right to self-determination, but they also compromised her health and influenced aspects of her adult life such as gender identity).

139. *German Gender-Assignment Case Has Intersexuals Hopeful*, DEUTSCHE WELLE (Dec. 12, 2007), <http://www.dw.de/german-gender-assignment-case-has-intersexuals->

When Christiane was eighteen years old, a physician discovered her complete female internal reproductive organs during a routine appendectomy.¹⁴⁰ Instead of informing Ms. Völling of the discovery, the surgeon removed her uterus and ovaries without her consent and did not tell her of the procedure.¹⁴¹ This operation permanently removed her ability to reproduce as a female and produce estrogen.¹⁴² Thirty years after the operation, Christiane successfully sued the physician for removing her female reproductive organs without her consent.¹⁴³

The Cologne Regional Court found that by removing Christiane's ovaries, the surgeon denied her the ability to produce her own sex hormones, to attain a life as a woman, to self-identify as a woman, to experience a female sexuality, and to attempt to procreate as a woman.¹⁴⁴ As such, the physician had "culpably violated her health and self-determination."¹⁴⁵ This ruling recognizes that a surgical procedure that determines one's sex not only affects one's physical health, but also is inherently tied to that person's autonomy—or right to self-determination.¹⁴⁶ The Court found Ms. Völling's doctor liable

hopeful/a-3000902-1 (last visited Jan. 31, 2014) (revealing that a midwife believed Christiane's clitoris was actually a penis); see AGIUS & TOBLER, *supra* note 3, at 84 (explaining that Christiane Völling was raised as a boy).

140. AGIUS & TOBLER, *supra* note 3, at 84 (observing that Christiane had identified as male since birth); see Cologne District Court, Case 25 O 179/07, (Ger.), *supra* note 137 (noting that Christiane had a fully formed uterus and ovaries).

141. See Cologne District Court, Case 25 O 179/07, (Ger.), *supra* note 137 (indicating that the surgeon removed Christiane's female reproductive organs upon their discovery without consulting other medical professionals).

142. Cologne District Court, Case 25 O 179/07, (Ger.), *supra* note 137 (claiming that this action's permanence constituted a violation of the plaintiff's fundamental freedoms). AGIUS & TOBLER, *supra* note 3, at 84 (indicating that the physician deprived Christiane of her opportunity to bear a child).

143. See Cologne District Court, Case 25 O 179/07, (Ger.), *supra* note 137 (ruling in favor of the plaintiff); see also AGIUS & TOBLER, *supra* note 3, at 84 (explaining that Christiane did not discover she was intersex until she received a pamphlet on intersexuality in 2006). Thereafter, she learned of her physician's actions and filed suit against the physician the following year. *Id.*

144. Cologne District Court, Case 25 O 179/07, (Ger.), *supra* note 137 (spelling out the future consequences of the surgeon's actions).

145. *Id.* (translation on file with author) (commenting on the recklessness of the procedure and its preclusion of allowing Christiane to make important life decisions).

146. *Id.* (explaining that when the doctor removed Völling's ovaries, he took away her means to live naturally as a woman and develop a female sexuality directly violating her self-determination).

for violating her health and right to self-determination, awarding her EU€100,000 in damages and the costs of litigation.¹⁴⁷

C. *The Self-Determination Doctrine in the United States*

The right to self-determination is a common law concept in the United States that recognizes that “sanctity of individual free choice and self-determination are fundamental constituents of life.”¹⁴⁸ This safeguards “an individual’s strong personal interest in directing the course of his own life . . . [and] an individual’s right to behave and act as he deems fit, provided that such behavior and activity do not conflict with the precepts of society.”¹⁴⁹ Most importantly, the right to self-determination establishes that “the value of life may be lessened rather than increased by the failure to allow a competent human being the right of choice.”¹⁵⁰ The right to self-determination is so completely intertwined with the constitutional guarantee of liberty that courts recognize that individuals are protected from bodily intrusions that conflict with the interests protected by the Due Process Clause of the Fourteenth Amendment.¹⁵¹

147. *Id.*

148. *See, e.g.*, In re Conroy, 486 A.2d 1209, 1223–24 (N.J. 1985) (holding that a gastronal feeding tube can be removed from an invalid nursing home resident if the life-saving medical treatment is against the patient’s wishes or withholding the life-sustaining treatment is in their best interests); *see also* Marguerite Anne Chapman, *The Uniform Rights of the Terminally Ill Act: Too Little, Too Late?*, 42 ARK. L. REV. 319, 324 (1989) (characterizing the right to self-determination as “the right to decide what will or what will not be done to one’s body”).

149. In re Jobes, 529 A.2d 434, 453 (N.J. 1987) (internal quotation marks omitted) (quoting Conroy, 486 A.2d 1209 (N.J. 1985)) (declaring that the objective of judicial action in medical treatment decisions is to preserve the patient’s right to self-determination).

150. *Conroy*, 486 A.2d at 1224.

151. *Cruzan by Cruzan v. Missouri Dep’t. of Health*, 497 U.S. 261, 287–88 (1990) (O’Connor, J., concurring) (articulating that the liberty interest results from individuals making decisions regarding the State’s invasions of the body). *See e.g.*, *Winston v. Lee*, 470 U.S. 753, 759 (1985) (holding that the State cannot surgically intrude one’s body to recover criminal evidence because it violates that individual’s right to privacy and security); *Rochin v. California*, 342 U.S. 165, 172 (1952) (concluding that forcibly retrieving contents swallowed by an individual violates his due process of law).

D. *The Crawford Case*

The *Crawford* case is a case of first impression in the United States, as M.C. is the first intersex plaintiff to assert constitutional claims in a federal court against a defendant for performing genital-normalizing surgery.¹⁵² *Crawford* is currently being litigated in the US District Court for the District of South Carolina.¹⁵³ As of March 2014, the parties are engaging in discovery and preparing to file motions for summary judgment.¹⁵⁴

On May 14, 2013, an eight-year-old plaintiff, M.C., filed a complaint by and through his parents, Pamela and Mark Crawford.¹⁵⁵ The complaint alleged that the doctors who performed genital-normalizing surgery on him when he was sixteen months old violated his constitutional rights.¹⁵⁶ This is the first cause of action in the United States that seeks legal redress for the harm caused by genital-normalizing surgery performed on an intersex infant.¹⁵⁷

152. See generally *Crawford Complaint*, *supra* note 10 (alleging that a sex assignment operation deprived the plaintiff of his constitutional rights to liberty, privacy, and bodily integrity); see also Haas, *supra* note 83 (noting that many countries across the world including the United States have not addressed intersex issues in the court system).

153. See generally Order Denying Motion to Dismiss, *M.C. v. Aaronson*, No. 2:13CV01303 (D.S.C. Aug. 29, 2013) [hereinafter *Crawford Order*] (granting plaintiff's motion for expedited discovery upon denying defendant's motion to dismiss).

154. See Docket Proceedings, *M.C. v. Aaronson*, No. 2:13CV01303 (D.S.C. 2013) (showing various motions from the parties but no motion for summary judgment).

155. See *Crawford Order*, *supra* note 153 (using "M.C." to protect the minor's identity and indicating the plaintiff brought this cause of action through his parents).

156. See *id.* (including the rights to bodily integrity, privacy, procreation, and liberty). M.C. also filed a cause of action against his physicians in South Carolina's County of Richland Court of Common Pleas alleging gross negligence and medical malpractice based on lack of informed consent. While this Note discusses the doctrine of informed consent in the context of genital-normalizing surgery, it will not analyze M.C.'s state claims but rather focus on its relationship to his federal constitutional claims. See Colleen Jenkins, *Couple Sues Over Adopted Son's Sex-Assignment Surgery*, WESTLAW J. MED. MALPRACTICE 4, May 23, 2013, at *1–2 (discussing the *M.C. v. Aaronson* lawsuit and its current proceedings).

157. See *Groundbreaking SPLC Lawsuit Accuses South Carolina, Doctors and Hospitals of Unnecessary Surgery on Infant*, S. POVERTY L. CTR., <http://www.splcenter.org/get-informed/news/groundbreaking-splc-lawsuit-accuses-south-carolina-doctors-and-hospitals-of-uN.N.ece> (last visited Nov. 16, 2013). The Southern Poverty Law Center filed this lawsuit on behalf of M.C., naming Greenville Hospital System, Medical University of South Carolina, and individual employees as defendants.

M.C. was born prematurely in December 2004 with both male and female internal reproductive organs—known as a “true hermaphroditism.”¹⁵⁸ Doctors initially identified M.C. as a male based on the overall physical appearance of his genitalia but concluded that M.C. could develop normally whether he was raised as a boy or a girl.¹⁵⁹ M.C.’s biological parents had given up their parental rights by putting him up for adoption shortly after he was released from the hospital, and the South Carolina Department of Social Services (“SCDSS”) had taken custody of M.C. on February 16, 2005.¹⁶⁰ The SCDSS had maintained custody and the right to make decisions regarding medical treatment for M.C. until his adoptive parents gained custody on December 11, 2006.¹⁶¹

While the SCDSS had custody of M.C., doctors at the Medical University of South Carolina routinely examined M.C. to determine his sex.¹⁶² On April 26, 2005, a doctor observed that one of M.C.’s gonads resembled an ovary and the other resembled a testis.¹⁶³ After months of testing and examinations, M.C.’s primary physicians were unable to make a conclusive determination of whether M.C. was male or female.¹⁶⁴ In January 2006, M.C.’s doctors concluded in their medical records that sex assignment surgery was neither urgent nor necessary and that M.C. had the potential to identify as a boy or a girl as he developed throughout childhood.¹⁶⁵

Over the next several months, M.C.’s team of physicians ultimately decided—without explanation—that he should be raised as a girl and assigned him the female sex by removing his

158. *Crawford Complaint*, *supra* note 10, para. 3 (specifying that M.C.’s specific condition is ovotesticular DSD). Medical records indicate that M.C. was born with a “rather large” phallus, significantly high testosterone levels, a vaginal opening below the phallus, and a “scrotalized labia.” *Id.* at 41. (revealing that M.C. was also born with a twin sister who died several months after birth due to complications from prematurity).

159. *Id.* para. 3 (describing M.C.’s genitalia as stated in his medical records).

160. *Id.* para. 38 (explaining that the State acted as guardian for M.C. during the time doctors treated his intersex condition).

161. *Id.*

162. *Id.* para. 42–46.

163. *Id.* para. 42 (detailing M.C.’s “ambiguous genitalia”).

164. *Id.* para. 43 (noting that M.C.’s condition was impossible to determine).

165. *Id.* paras. 43, 46.

phallus and constructing a hollowed vagina in his groin.¹⁶⁶ On April 18, 2006, Dr. Aaronson, one of M.C.'s primary physicians, removed M.C.'s phallus and excised most, if not all, of his male reproductive tissue.¹⁶⁷ Four months later, in August 2006, Pam and Mark Crawford took custody of M.C. and legally adopted him in December 2006.¹⁶⁸ They then brought this suit on behalf of M.C. to "vindicate his rights" and speak out against the practice of genital normalizing surgery.¹⁶⁹

M.C.'s complaint alleges that the physicians and the social workers who consented to his surgery violated his "substantive due process rights to bodily integrity, privacy, procreation, and liberty, in violation of the Fourteenth Amendment of the United States Constitution."¹⁷⁰ He asserts that by assigning him a sex and selecting a gender for him, the physician-defendants "usurped . . . intimate and profound decisions from [him] when he was barely older than an infant" and that their actions "interfered with [his] future ability to form intimate, procreative relationships, choices central to his personal dignity and autonomy."¹⁷¹ M.C. also raises a procedural due process claim that his rights to bodily integrity, privacy, procreation, and liberty were deprived because the physicians operated on him "without requesting, initiating, or inquiring as to a pre-deprivation hearing."¹⁷² The District Court Judge denied the

166. *Id.* para. 49 (pointing out that the doctors who decided M.C.'s sex proffered no specific reason for their determination).

167. *Id.* para. 51 n.1 (noting that in 2001, a pediatric journal published an article written by the defendant, Dr. Ian Aaronson, which stated that "carrying out a feminizing genitoplasty on an infant who might eventually identify herself as a boy would be catastrophic."); see Ian A. Aaronson, *The Investigation and Management of the Infant with Ambiguous Genitalia: A Surgeon's Perspective*, 31 CURR. PROBL. PEDIAT. 168 (2001) (contemplating the disastrous results that would occur from assigning a child to a sex that does not match their gender identity).

168. *Crawford Complaint*, *supra* note 10, para. 17 (providing a timeline of M.C.'s custodians).

169. *Id.* para. 12 (stating the Crawfords' reasons for bringing this action as found in the preliminary statement); see also SPLCenter, *The Crawfords Speak About Groundbreaking Intersex Case*, YOUTUBE, <http://www.youtube.com/watch?v=0qH4P5PtC4w> (explaining why M.C.'s parents filed this lawsuit).

170. *Crawford Complaint*, *supra* note 10, paras. 72, 74, 77 (listing M.C.'s specific constitutional claims).

171. *Id.* at 9–10 (introducing the fundamental concepts of how genital-normalizing surgery deprived him of constitutional rights).

172. *Id.* at 82 (asserting violations of procedural due process rights under the Fourteenth Amendment).

physician-defendants' motion to dismiss based on qualified immunity on August 22, 2013.¹⁷³ The Judge concluded that the doctrine of qualified immunity did not apply to M.C.'s doctors as government officials because they violated his constitutional right to procreation when they performed genital-normalizing surgery on him.¹⁷⁴ The parties are currently participating in the discovery process as litigation for the *Crawford* case continues.

E. Alternative Policies & Pragmatic Approaches

Rulings such as *Völling* and *The Decision of Y.Y.* represent progressive attitudes toward recognizing intersex autonomy, but the judiciary is not the sole source for countries to expand rights of the intersex individual. Germany has taken the initiative to acknowledge the intersex community, and in 2010 charged its Ethics Council to develop an official position on intersex issues, including discrimination and living situations.¹⁷⁵ In 2011, the Council announced its three main findings: (1) intersex individuals have a right to "physical integrity," and genital-normalizing surgery ought to be delayed as long as possible; (2) intersex individuals' right to self-determination precludes parental consent to genital-normalizing procedures from being absolute; and (3) the rights to self-determination and protection from discrimination provide freedom for all intersex persons

173. See *Crawford Order*, *supra* note 153, at 1, 6 (internal quotation marks omitted) (explaining that the "doctrine of qualified immunity protects government officials performing discretionary functions 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'").

174. *Id.* at 8–10 (concluding that because M.C. has an "absent uterus" and his doctors removed his male reproductive organs, the defendants violated M.C.'s constitutional right to procreation).

175. An Ethics Council is an administrative body in Member States of the European Union that serves as a national platform for dialogue about medical, ethical, and social issues in the life sciences. Council Directive 2001/20/EC, art. 2(k), 2001 O.J. (L 121) (E.C.) 34 EUROPEAN COMMISSION. The German Ethics Council, established on June 8, 2001, "provides an umbrella for interdisciplinary discourse relating to science, medicine, theology, philosophy, and the social and legal sciences, expressing its views on both the ethical aspects of new developments in the life sciences and their impact on individuals and society as a whole." *Ethically Speaking*, EUROPEAN COMM., Jan. 2007, at 28, available at http://ec.europa.eu/bepa/european-group-ethics/docs/ethspeakweb_8_en.pdf; see AGIUS & TOBLER, *supra* note 3, at 84 (discussing efforts to promote the understanding of specific minority groups).

from being forced to choose for themselves a sex in the exclusive categories of the male-female gender binary.¹⁷⁶

The German government determined that hardships facing intersex persons is a social issue and implemented a practical, bureaucratic solution to remedy these problems.¹⁷⁷ Germany has already seen results from its actions.¹⁷⁸ In April 2011, a bill was introduced before the German Parliament calling for institutionalized education on intersex issues and a moratorium on genital-normalizing surgeries used to treat intersex infants, however, the legislation never passed.¹⁷⁹

A novel administrative approach to the protection of the rights of intersex individuals is found in Germany's inclusion of an option for a "third sex" on birth certificates.¹⁸⁰ This unique practice, implemented on November 1, 2013, promotes the autonomy of the intersex individual by departing from the strict legal recognition of only those who fit within the male-female biological sex binary.¹⁸¹ Further, New Zealand, Nepal, Australia, and Uruguay offer their citizens passports with a third gender option beyond the traditional male-female categories.¹⁸² This is another example of a mechanism outside of the judicial arena

176. AGIUS & TOBLER, *supra* note 3, at 85 (recalling the Council's conclusions).

177. *Id.* (noting the progressive measures taken by Germany's government to bolster awareness and equality for the intersex community).

178. *Id.* (following Germany's rapid response to the rise in the awareness of intersex issues).

179. *Id.* (discussing radical legislation that would enforce complete autonomy and consciousness of intersexuality).

180. Eric Cameron, *Germany Adds Third Gender Option to Birth Certificates*, HRC BLOG (Aug. 19, 2013), <http://www.hrc.org/blog/entry/germany-adds-third-gender-option-to-birth-certificates> (reporting another effort by Germany to depart from the convention of the strict male-female sex binary); see Jacinta Nandi, *Germany Got It Right by Offering a Third Gender Option on Birth Certificates*, GUARDIAN (London), Nov. 10, 2013, 6:30 AM, <http://www.theguardian.com/commentisfree/2013/nov/10/germany-third-gender-birth-certificate> (commenting on Germany's implementation of a progressive policy on gender and intersex issues).

181. See Cameron, *supra* note 180 (noting Germany's progressive efforts toward accommodating the intersex community); see also AGIUS & TOBLER, *supra* note 3, at 84–85 (2012) (encouraging other European nations to follow in Germany's footsteps).

182. Michael Bochenek & Kyle Knight, *Establishing a Third Gender Category in Nepal: Process and Prognosis*, 26 EMORY INT'L L. REV. 11, 24–26 (2012) (discussing several national governments' efforts to address transgender and intersex populations); see Zach Gordon, *Nepal's Third Gender and the Recognition of Gender Identity*, THE JURIST (Apr. 23, 2012, 5:04 PM), <http://jurist.org/hotline/2012/04/bochenek-knight-gender.php> (investigating Nepal's protection of transgender and intersex individuals with its third gender category on official identification documents).

that countries can adopt to recognize its citizens who are intersex or otherwise gender-variant.

III. *DEVELOPING THE CRAWFORD RULE: IMPORTING AUTONOMY FROM COLOMBIA AND GERMANY*

Part III uses court decisions of the Constitutional Court of Colombia and Germany's Cologne Regional Court to argue that the South Carolina District Court should hold in *Crawford* that genital-normalizing surgery violated M.C.'s constitutional right to liberty. Part III.A explains how genital-normalizing surgery implicates fundamental rights of the intersex individual by examining *The Decision of Y.Y.* and proposes a standard for evaluating M.C.'s constitutional claims. Part III.B then evaluates the best interests of intersex children by comparing the facts, holdings, and reasoning of the Colombia and Germany decisions to *Crawford*. Part III.C argues that the *Crawford* court should, in its eventual holding, establish broader protection for children with ambiguous genitalia than did Colombia's holdings in *The Decision of X.X.* and *The Decision of Y.Y.*

A. *Constitutional Implications*

The Constitutional Court of Colombia's opinion in *The Decision of Y.Y.* declared that when fundamental rights are at stake, a "constitutional dimension" arises on the issue of consent in the patient-doctor relationship with regards to genital-normalizing procedures.¹⁸³ The Court articulated that the facts of the case must be matched with the fundamental rights at issue—the right to identity and the right to develop one's own person.¹⁸⁴ The surgery performed on Y.Y. violated his right to self-determination because it did not allow him to "freely develop his identity," just as the surgery performed on M.C. denied him the right to develop an identity on his own.¹⁸⁵

183. Corte Constitucional [C.C.] [Constitutional Court], octubre 23, 1995, Sentencia T-477/95, Gaceta de la Corte Constitucional [G.C.C.] (vol. , p.) (Colom.), at 10 (noting the constitutional interests at play for intersex individuals who face genital-normalizing procedures).

184. *Id.* at 14 (noting that the surgery that transformed Y.Y. into an anatomical female implicated constitutional freedoms).

185. See *supra* note 151 and accompanying text (illustrating the right to identity's interwoven relationship with the right to self-determination). See *Crawford Complaint*,

The German court in *Völling* held that the doctor deprived Christiane of her right to self-determination by taking away her opportunity to self-identify as a woman and violated her bodily integrity.¹⁸⁶ This case suggests that a surgery that modifies an individual's sex organs without their consent greatly affects that individual's perception of their own biological sex, gender identity, sexual orientation, and procreative capabilities in a morally and legally unprincipled manner.¹⁸⁷ The surgery performed on Christiane violated her right to self-determination because it did not allow her to physically develop as a woman, just as M.C.'s surgery did not allow him to choose to develop as a boy.¹⁸⁸

The Decision of Y.Y. and Völling are particularly similar to the facts in *Crawford* because Y.Y. and Christiane Völling brought their suits years after learning of their genital-normalizing surgery.¹⁸⁹ Although Christiane Völling was not an infant when her physician operated on her, and Y.Y. was not intersex, the outcomes of these cases and the courts' respect for the plaintiffs' self-determination can be helpful in understanding the rights of M.C.¹⁹⁰ Genital-normalizing surgery affects every intersex individual's right to liberty, unless they gave consent to have the procedure performed.¹⁹¹ Parental fears and prejudices involved in the decision making process inevitably result in a choice to normalize the child as quickly as possible without a true concern

supra note 10, paras. 7–9 (asserting that the defendant physicians modified M.C.'s body to make it appear female by permanently removing his male sex organs).

186. *See supra* Part II.B (discussing how the surgeon stripped the plaintiff of the right to freedom of choice as an adult to procreate and develop an identity as a woman).

187. *See supra* Part II.B (analyzing in *Völling* the biological, psychological, social, and legal harms caused by a nonessential surgery that altered the plaintiff's sex organs).

188. *See supra* notes 141–144, 171, 174 and accompanying text (discussing Christiane and M.C.'s loss of procreative capabilities due to genital-normalizing surgery).

189. *See supra* Part II.D (describing how M.C. sued his physicians at eight years of age for a surgery that was performed on him during infancy).

190. *See supra* Part II (examining the Colombian and German cases involving an operation that assigned a sex to the plaintiff affecting that individual's right to self-determination); AGIUS & TOBLER, *supra* note 3, at 84 (highlighting the importance of the right to self-determination for individuals who are not allowed the opportunity to develop a personal identity).

191. *See supra* Part II.C–D (contemplating the connection between an individual's liberty and that individual's decision to surgically alter their genitalia).

for the best interests of the child.¹⁹² When parents discover that their child has ambiguous genitalia, medical professionals and parents undermine true informed consent by assuming that having the child's genitals "fixed" is in the best interests of the child.¹⁹³

Current informed consent does not consider a minor's best interests in the context of genital-normalizing surgery on intersex newborns, therefore the right to self-determination cannot be protected.¹⁹⁴ Like the doctor who failed to inform Christiane Völling of her natural reproductive organs, M.C.'s physicians violated his right to self-determination by assigning him the female sex without his consent.¹⁹⁵ Christiane Völling was not given the opportunity to learn she could live as a woman, and her physician stole her right to procreate as a woman with her natural reproductive organs.¹⁹⁶ Genital-normalizing surgery likewise robbed M.C. of the opportunity to live naturally as a male and denied his right to procreate with his natural reproductive organs.¹⁹⁷

Genital-normalizing surgery tragically affected M.C. and infringed upon his fundamental rights at the tender age of sixteen months.¹⁹⁸ Colombia's ruling in *The Decision of Y.Y.* and

192. See *supra* notes 97–99, 145–147 and accompanying text (discussing the conclusions of *The Decision of Y.Y.* and the *Völling* courts, which found genital-normalizing surgery to infringe on the individuals' autonomy); see Tamar-Mattis, *supra* note 8, at 87 (noting that culturally-biased recommendations and medical professionals acting outside of their expertise contribute to a decision that does not concern the best interests of the child); Lee, *supra* note 26 (promoting immediate surgery in order to normalize the child).

193. See *supra* Part II.A.2 (observing *The Decision of X.X.*'s discussion on parental prejudices regarding ambiguous genitalia); see also Tamar-Mattis, *supra* note 8, at 86 (explaining that genital-normalizing surgery is often presented to parents by doctors in a way that suggests the procedure is a foregone conclusion).

194. See *supra* notes 59–62, 183–185 and accompanying text (showing that the standard practice of treating intersex infants does not consider the true best interests of the child because it still harbors Dr. Money's flawed theory of psychosexual neutrality and aims to preserve social norms).

195. See *supra*, Part II.B (recounting a genital-altering surgery that was kept secret from an individual as a violation of that person's right to self-determination).

196. See *supra* Part II.B (reviewing the *Völling* decision).

197. See *supra* Part II.D (observing that physicians removed M.C.'s male reproductive tissue during the surgery that constructed his female genitalia).

198. See *supra* Part III.A (discussing the constitutional implications of genital-normalizing surgery and describing how the doctrine of informed consent fails as a

Germany's *Völling* decision demonstrate how disambiguating a child's genitalia and selecting a sex for them without their consent implicates fundamental liberty interests.¹⁹⁹ These cases conceptualize the problematic nature of this medical practice and provide a standard for analyzing M.C.'s constitutional claims. Like the Colombian and German courts, US courts can examine specific issues which address the extent to which the surgery (1) violated M.C.'s right to self-determination, (2) precluded M.C. from developing an identity, and (3) was medically unnecessary.²⁰⁰ It is clear that no guardian can give consent for such a surgery without ignoring the best interests of the child.²⁰¹

B. *Evaluating M.C.'s Best Interests*

Part III.B explores the constitutionality of genital-normalizing surgery in the context of *Crawford* by analyzing the urgency of M.C.'s surgery and the degree to which it deprived him of his right to self-determination and to develop an identity. In Part III.B.1, this Note analyzes *The Decision of Y.Y.* and *Völling* and compares them to *Crawford* to evaluate the extent to which genital-normalizing surgery violated M.C.'s right to self-determination. Part III.B.2 discusses the reasoning in *The Decision of Y.Y.* and the UN Convention on the Rights of the Child to demonstrate how denying an individual the freedom to develop their identity violates their constitutional right to liberty. Part III.B.3 uses the holdings of *The Decision of X.X.* and

protection for one's right to self-determination within the context of this medical procedure).

199. See *supra* notes 171–178 and accompanying text (noting that invasive procedures that alter sexual organs implicate the right to procreate and the right to self-determination).

200. Corte Constitucional [C.C.] [Constitutional Court], octubre 23, 1995, Sentencia T-477/95, Gaceta de la Corte Constitucional [G.C.C.] (vol. , p.) (Colom.), at 22 (analyzing the urgency, danger, and deprivation of fundamental rights to rule in favor of Y.Y.); see Kölner Landgericht [Cologne District Court], 25 O 179/07, 06.02.2008 (assessing the right to self-determination to conclude that the surgery violated Christiane's fundamental liberty interests).

201. Constitutional Court, Case T-477/95, (Colom.) at 14 (listing three factors that determine the limits of informed consent for genital normalizing surgery: 1) the impact of the procedure on the child's current and future autonomy; 2) the urgency and importance of the procedure for the child; and 3) the age of the child).

Völling to argue that choosing a sex for intersex infants is unnecessary and deprives intersex children of their autonomy.

1. The Right to Self-determination

The Constitutional Court of Colombia protected the Colombian minor from the “invasive and risky” surgery after doctors refused to normalize X.X.’s genitals without her consent.²⁰² The physicians in South Carolina did not exercise such caution in M.C.’s case and took action that immensely affected his best interests.²⁰³ Like the Constitutional Court in Colombia, courts in the United States ought to acknowledge the UN Convention on the Rights of the Child, which declares “[p]arents or . . . legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”²⁰⁴ This principle emphasizes the rights of individuals too young to speak for themselves to be free from medical and parental intervention of their body.²⁰⁵

M.C.’s doctors had no medical reason to operate on him, and performing an arbitrary sex assignment on a child that permanently deprives him of constitutional guarantees cannot be said to consider the best interests of the child.²⁰⁶ The defendants in the *Crawford* case violated M.C.’s right to self-determination by denying him the choice to retain his male genitalia or to self-identify as an adult male with functional sexual organs.²⁰⁷ M.C. relies on the principle that liberty is

202. See *Translation of the X.X. Decision*, *supra* note 107, at 123 (characterizing genital-normalizing procedures as dangerous).

203. See *Crawford Complaint*, *supra* note 10, para. 5 (recalling that physicians removed M.C.’s phallus and male reproductive tissue); *id.* at 123 (classifying a procedure that “normalizes” a child’s genitalia as dangerous, greatly interfering with an individual’s body, and affecting the best interests of the child).

204. See *supra* note 102 and accompanying text (presenting the United Nations Convention on the Rights of the Child).

205. See UN Convention on the Rights of the Child, *supra* note 102 (admonishing nation-states to look after minor children who cannot look after themselves).

206. See *supra* notes 186–187, 190–191 and accompanying text (explaining that a medically unnecessary procedure that precludes an individual from constructing their own social and physical identity disregards that individual’s interest in his own liberty).

207. See *Kölner Landgericht* [Cologne District Court], 25 O 179/07, 06.02.2008 (holding that the physician defendants violated the plaintiff’s right to self-

intertwined with self-determination to assert that doctors violated his right to liberty and to bodily integrity by performing genital-normalizing surgery on him without his consent.²⁰⁸

2. Developing an Identity

In *The Decision of Y.Y.*, medical professionals castrated the plaintiff just like physicians did to M.C.²⁰⁹ Y.Y. rejected the sex and gender assigned to him as he went through childhood, and as a teenager learned what was done to him as an infant.²¹⁰ As an analogous scenario has played out in the United States, the District of South Carolina should examine the extent to which these surgeries affect individuals' identities just as Colombia did nearly two decades ago.²¹¹

The UN Convention on the Rights of the Child played a role in the Court's analysis in *The Decision of Y.Y.* by conferring a duty upon Colombia to "respect the right of the child to preserve his or her identity . . . [and to] provide appropriate assistance and protection" when someone unlawfully interferes with particular elements or all of the child's identity.²¹² Denying an individual the freedom to develop their identity violates their right to self-determination.²¹³ By violating M.C.'s self-determination, the physicians implicated his constitutional freedom of liberty.²¹⁴

determination by permanently removing her female sex organs and taking away her free choice to self-identify as an adult woman with a female sexual identity).

208. *See supra* Part II.C–D (explaining liberty's link with self-determination and reviewing M.C.'s procedural and due process claims against his physicians for violating his constitutional right to liberty and bodily integrity).

209. *See supra* Part II.A, II.D (detailing the surgeries of M.C. and Y.Y.).

210. *See supra* Part II.A (describing the torment experienced by Y.Y. because of the mismatch between his gender identity and sex).

211. *See supra* Part II.A (discussing how the Constitutional Court of Colombia recognized the harms imposed on intersex children when their sex is determined without soliciting their input).

212. *See supra* Part II.A (noting that Colombia upheld its duty conferred by Article 8 of the U.N. Convention on the Rights of the Child).

213. *See supra* notes 171, 174 and accompanying text (demonstrating how the intersex individual's fundamental rights to identity, autonomy, self-determination, and liberty are connected in the context of genital-normalizing surgery).

214. *See supra* notes 185–187 and accompanying text (explaining that self-determination affects one's identity, which is inherently tied to liberty).

3. The Timing of Surgery

The *Crawford* court should import the analysis from *The Decision of X.X.* to hold that there is harm facing intersex infants because of genital-normalizing surgery that has no impact on the child's health.²¹⁵ The Colombian jurisprudence on this issue begins an analysis that lays the foundation for complete intersex autonomy by conceding that "parents cannot force their children to undergo risky surgeries or treatments that do not produce health benefits."²¹⁶ The tragedy that happened to M.C. demonstrates why the United States should use Colombia's decision in *The Decision of X.X.* as an example to extend protections by recognizing the autonomy of intersex minors. As M.C.'s mother, Pamela Crawford, put it

We feel very strongly that these decisions to permanently alter somebody's genitalia and their reproductive ability for no medical reason whatsoever is an abhorrent practice and can't be continued It is too late for our son The damage has been done to him.²¹⁷

C. *The Crawford Outcome*

To interpret *The Decision of X.X.* as a clear victory for the medical treatment of the intersex community would be to ignore an important aspect of the decision—an aspect that still harbors the flawed assumption of Dr. John Money's theory. The decision asserted that because X.X. was eight years old the urgent need for surgery was "eliminated," therefore a genital-normalizing procedure "represents a greater invasion of her

215. See *supra* note 114 and accompanying text (noting the lack of urgency and health benefits to individuals who receive genital-normalizing surgery).

216. Corte Constitucional [C.C.] [Constitutional Court], Sentencia SU-337/99, Gaceta de la Corte Constitucional [G.C.C.] (vol. , p.) (Colom.) 68; see *supra* notes 104–105 and accompanying text (discussing the Constitutional Court of Colombia's recognition of intersex autonomy in the unique circumstances of genital-normalizing surgery).

217. Jenkins, *supra* note 156 (quoting M.C.'s mother on thoughts about sex assignment procedures for intersex children). To hear M.C.'s parents discuss the lawsuit, see *The Crawfords Speak About Groundbreaking Intersex Case*, *supra* note 169 (spelling out the theory that children will successfully adapt to whichever sex is assigned to them as an infant because they are psychosexually neutral at birth).

autonomy.”²¹⁸ The opinion suggests there can be instances when a parent gives valid consent to a surgical remedy of their child’s ambiguous genitalia as well as circumstances where it is impossible for a parent to give legal consent to genital-normalizing surgery for their intersex child.²¹⁹ This distinction between “true” informed consent and unconstitutional parental consent hinges on an inquiry the court examined but did not fully resolve: when is a parent’s consent to surgery as treatment for an intersex child invalidated by the autonomy of the child?²²⁰

In *The Decision of X.X.*, the Colombian Court found that postponing surgery did not violate the parent’s constitutional right to privacy of the home because allowing the child to develop a gender identity privileged “the minor’s autonomy within the home.”²²¹ According to the Court, a child of eighteen months would not merit the privileges of autonomy within the home, thereby not securing the right to develop her identity and the opportunity to develop her gender identity.²²² The Court makes the assumption that genital-normalization surgery on a newborn child is less violative of that child’s autonomy and right to self-determination because there is a possibility that the child will develop a gender identity that matches the genitalia chosen for them.²²³ It is a paradox to protect a child’s autonomy because that child can consent to medical procedures, while

218. Constitutional Court, Case SU-337/99, (Colom.), at 88–90 (suggesting that parents can consent to genital-normalizing surgery for their children who do not understand the concept of gender but cannot for children who do understand such a concept).

219. *Id.* at 86–89, 90–91 (purporting that an infant’s inability to give informed consent provides doctors and parents with the right to surgically choose a physical sex for the intersex child).

220. *Id.* at 90 (inquiring “at what age can we presume the psychological changes have occurred that invalidate a paternal surrogate consent to treat the genital ambiguity of the minor X.X.?”).

221. *Id.* at 87 (balancing the intersex child’s autonomy with the parent’s right to make decisions for their children).

222. *Id.* at 88. (citing psychological studies that suggest at the age of five an individual completes the “preoperational” stage, where a sense of self has not fully formed, and develops intelligence and a sense of consciousness). *But see* Holmes, *supra* note 2, at 116 (arguing that this decision creates an arbitrary protocol for permitting potentially traumatic genital-normalizing procedures on infants while protecting older children from the harmful surgery).

223. Constitutional Court, Case SU-337/99, (Colom.), at 88–90 (exemplifying Dr. Money’s antiquated and flawed theory that children will develop genders which match their assigned genitalia).

proposing that the same protection from a forced, invasive, and unnecessary medical procedure should not extend to a child who cannot make medical decisions for themselves.²²⁴

Sex assignment surgery on an infant employs the assumption that an immediate selection of a specific sex is best for the child, but it does not consider the devastating effect it might have on the child if the sex selection does not match the gender the child develops.²²⁵ The chances of forcing a child to live in the “wrong sex” are much higher when a sex determination is made at infancy than when a child has already created a gender identity, but the Colombian Court ignores this fact.²²⁶ A forced sex assignment surgery deprives an infant just as much of their autonomy, right to self-determination, and legal protections under the UN Convention on the Rights of the Child.²²⁷

The complaint in *Crawford* highlights the potential infringement of fundamental rights and detrimental effects of the current medical treatment for intersex infants.²²⁸ Such early surgeries undermine the intersex individual’s right to self-determination and autonomy because the procedures disregard

224. *See id.* (reasoning that a child of five years merits more protection than an infant from a medically unnecessary surgery that potentially deprives the child of their rights to procreate, to self-determination, and to identity); *See Holmes, supra* note 2, 116–17 (arguing that this decision only protects children whose genital ambiguity is discovered past the infancy stage where making competent medical decisions becomes more of a possibility).

225. Constitutional Court, Case SU-337/99, (Colom.), at 86–86 (reasoning that a sex assignment surgery on an individual who is aware of their body has the potential to proudly affect the individual’s identity without analyzing the effects of the same procedure on an infant). *See Tamar-Mattis, supra* note 8, at 71 (noting the inconsistency in a surgery that is performed in the best interests of the child yet has no empirical or anecdotal evidence to show the goals of such surgery are achieved).

226. Constitutional Court, Case SU-337/99, (Colom.), at 83 (assuming genital-normalizing surgery constitutes a greater invasion of a child’s autonomy the older they are). *But see Tamar-Mattis, supra* note 8, at 65–66 (arguing that genital-normalizing surgery is never urgent—even at infancy. It is the parent’s discomfort and shock that their child is not normal, which creates the immediate need for sex assignment surgery).

227. Constitutional Court, Case SU-337/99, (Colom.), at 86–87 (declaring that the UN Convention on the Rights of the Child requires a child to consent for themselves to a surgery that alters their genitalia).

228. *See Crawford Complaint, supra* note 10, paras. 9–10 (naming the issues of irreversibility, privacy, dignity, autonomy, procreative relationships, and sterilization); *supra* Part III.A (considering the conflict between sex assignment surgery and fundamental rights).

the potential violation of fundamental rights.²²⁹ Colombia's case of the minor X.X. and Germany's *Völling* decision specifically protect the freedoms that M.C. claims he was deprived of by genital-normalization surgery.²³⁰

When the policy from *The Decision of X.X.* plays out, parental decisions to use surgery as intersex treatment continue to implicate the child's fundamental rights.²³¹ The Court concluded that genital-normalizing surgery markedly affects a child's best interests and is inherently unnecessary, but it does not explain why parental consent for the surgery sought on an infant is acceptable while it is not for an older child.²³² The Court states a general principle that "[t]he rights of parents over their children are based only on their ability to protect the rights of the minor, so that the minor can develop as an autonomous person," but it does not illustrate how parents consenting to a procedure that permanently alters their *infant's* genitalia does not infringe upon the minor's rights.²³³

According to the theory articulated by the Court in *The Decision of X.X.*, doctors can perform genital-normalizing surgery on infants like M.C. through informed consent from the minor's parent or guardian because an intersex infant is a "developing autonomy" incapable of making competent medical decisions.²³⁴

229. *Crawford Complaint*, *supra* note 10, paras. 9–10 (alleging that the physicians' and social workers' actions "constituted an egregious, arbitrary, and enduring invasion of M.C.'s bodily integrity."); *see supra* Part II.A–B (discussing the deprivation of the right to an identity, autonomy, and the right to self-determination, in *The Decision of Y.Y.*, *The Decision of X.X.*, and *Völling*).

230. *See* Kölner Landgericht [Cologne District Court], 25 O 179/07, 06.02.2008 (concluding that a surgery which is medically unnecessary and affects intimate decisions such as procreation compromises the patient's bodily integrity and right to self-determination); *see also* Constitutional Court, Case SU-337/99, (Colom.) at 68, 91 (concluding that genital-normalizing surgery greatly affects a child's autonomy).

231. Constitutional Court, Case SU-337/99, (Colom.), at 88–90 (suggesting that normalizing an infant's genitalia when parents give "qualified and persistent" consent is constitutional).

232. *See id.* (noting that since the plaintiff was eight years old the urgency of surgically determining her sex so she has the opportunity to identify with a gender that matches her genitalia had disappeared).

233. *See Translation of the X.X. Decision*, *supra* note 107, at 123 (describing the detrimental effects of parents deciding to alter an intersex child's genitalia but not applying this logic to intersex infants).

234. *See supra* Part II.A (classifying infants as not completely autonomous individuals). *See also supra* notes 218–219 and accompanying text (discussing the court's protection of a child's right to freely develop their identity and choose a gender

This outcome is inadequate because it does not protect individuals like M.C., and to protect intersex infants' constitutional rights, the *Crawford* holding needs to go further than the Constitutional Court in Colombia's holding in *The Decision of X.X.*²³⁵

The law must abandon the conclusion that children are psychosexually neutral and that genital-normalizing surgery on intersex infants is not a harmful procedure.²³⁶ *Crawford* presents the United States with an opportunity to denounce an unethical medical practice that is based on an incorrect theory.²³⁷ By modifying natural anatomy that has been deemed socially unacceptable, genital-normalizing surgery isolates individuals like M.C. who do not conform to the traditional ideas of male and female and violates their fundamental right to liberty.²³⁸ If M.C. prevails, a constitutionally protected fundamental right to liberty would protect all intersex individuals incapable of medical consent from the harmful and arbitrary practice of genital-normalizing surgery.²³⁹

CONCLUSION

The German and Colombian jurisprudence examined in this Note have set the tone for international human rights in the intersex context and can provide guidance for US courts, specifically in application to the *Crawford* case. The enactment of third sex categories on birth certificates and passports marks a

identity as long as they are of an age that allows them to make competent medical decisions).

235. See *supra* notes 224–226 and accompanying text (examining the policy created by *The Decision of X.X.*, which protects children who can consent to surgery but not those who cannot make competent medical decisions).

236. See *supra* Part I.C (explaining Dr. Money's theory that early genital-normalizing surgery offers intersex individuals the opportunity to live a normal life because they can develop a gender identity to match the sex chosen for them at infancy).

237. See *supra* Part II.D (revealing that AAP guidelines still promote early surgery to disambiguate intersex children's genitalia).

238. See *supra* Part III.B (analyzing the best interests of M.C. to show that his genital-normalizing violated his right to self-determination thereby depriving him of his liberty).

239. See *supra* notes 202–203, 206–207, 230 (arguing that the best interests of the child do not allow for anyone to consent to genital-normalizing surgery except the individual herself).

movement away from the harmful male-female gender binary. This also encourages a delay in genital-normalizing surgery to allow all persons the opportunity to determine their own sex and gender instead of having a harmful sex determination forced upon them from birth—one which, may in fact, be inconsistent with their actual gender. The phenomenon of recognizing fundamental rights for intersex individuals to protect them from an ethically-flawed medical practice is on the brink of introduction into the US legal framework. The application of this progressive international thinking to the *Crawford* case would promote human rights and constitutional protection in the United States.

